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PRACTICE REPORTS



IN THE

S U P R E M E C O U R T

AND

COURT OF APPEALS

OF THE

STATE OF NEW-YORK.

BY NATHAN HOWARD, JR.,
COUNSELLOR-AT-LAW, NEW-YORK.

VOLUME XII.

— · —

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SUPERIOR COURT.

J. PHILIPS PHÆNIX, on behalf of himself and others, appellants, agt. THE COMMISSIONERS OF EMIGRATION, THE MAYOR, &c., OF NEW-YORK, and others, respondents.

In reference to *Castle Garden*, in the city of New-York. In Nov., 1807, the corporation granted to the United States a small portion of the original battery, fronting Castle Garden, and also a water-lot, lying westwardly, "to be made land, and gained out of the Hudson River, of the breadth of three hundred feet." This water-lot they had no right to grant, it belonged to the state.

This defect in title was supplied by the 2d section of an act of the legislature, passed in March, 1808; by which certain commissioners, appointed under a former act, were empowered "to grant to the United States, for the purpose of providing for the defence of the city, the use of any of the lands and waters belonging to the people of the state, in the city and county of New-York;" "which lands shall be granted on the express condition of their *reverting* to the people of this state in case they are not applied to the purposes aforesaid." (*Sess. L. 1808, ch. 51.*)

These commissioners, in July following, made a deed of cession to the United States of that part of the Battery which had been granted by the corporation, and extending westwardly into the river to the depth of five hundred feet, covering the whole of the water-lot aforesaid.

The United States entered immediately upon the lands thus ceded, filled up a portion of them, connecting them by a bridge with the Battery, and erected on the ground thus gained from the river an extensive fortification, known for many years as *Castle Clinton*, being the same building now known as Castle Garden; and in 1821, all the lands thus granted by the corporation and the

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state, were still in the exclusive possession and occupation of the United States.

On the 27th of March, 1821, the legislature passed an act, the first section of which declared, that "it shall be lawful for the mayor, aldermen, &c., of the city of New-York, to extend that *part of the said city usually called the Battery*, into the bay, and into the North and East rivers such distance as they may deem proper not exceeding six hundred feet;" and the next sentence declares that the lands thereby granted to the mayor, aldermen, &c., and their successors, were vested in them "forever, to remain for the purpose of extending the said Battery for a public walk, and for erecting public buildings and works of defence thereon."

Now the first question is, what is to be understood by the words in this last act—"all that part of the city usually called the Battery?" *Held*, that these words did not embrace Castle Garden, or any part of the lands ceded to the United States.

Nor did they embrace that part of the Battery which the corporation had before granted to the United States. But the true explanation of those words is found in the deed given by the corporation in 1815, to the purchasers of the lots on the Bowling Green, and on State-street. The covenant in that deed describes the lands to which it relates as "vacant grounds belonging to the corporation in the vicinity of the premises granted, and *commonly called the Battery*." They should be construed as applying exclusively to grounds then vacant, and then belonging to the corporation.

Castle Garden, therefore, cannot be treated as an extension of the Battery under the act of 1821; and the corporation do not derive their *title* to it from that act, and do not hold it subject to the supposed *trust* which that act created.

The *origin* of the title of the corporation is the act of congress of March, 1822, and the surrender and delivery of the possession, which, under that act, was made to the corporation by Gen. SCOTT, in 1823. From that time all the lands comprising Castle Garden, originally ceded to the United States, have been treated and used by the corporation as the property of the city of New-York, not subject to any trust or dedication whatever; and hence by an adverse possession, which has lasted more than twenty-five years, the title of the corporation has become absolute, not only as against individuals, but as against the public and the state itself.

In 1821, it was not in the power of the legislature, whatever might have been its intention, to convey to the corporation any title to the lands, or any part of the lands, which, under the act of 1808, had been ceded to the United States. The state was in no sense the owner, nor had it any estate or interest in those lands, which could be the subject of a valid transfer.

It is immaterial whether the grant to the United States was of the use of the lands, or of the lands themselves; since, whatever may be the form of expression, a grant which transfers the right of possession for an indefinite period, and which may remain in force forever, unless defeated by a future contingent act or event, creates a *fee*, and no other or less estate.

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Every estate which, although it may be determined upon a contingency, has no positive limit to its duration, is a fee.

The definition of a *fee* embraces every estate which is not for life, for years, or at will—every estate which in its nature is descendible.

There can be no *reversion* upon a *fee*, whether the fee be absolute or conditional. A *reversion*, in its legal signification, is applicable only to an estate which remains in the grantor and his heirs, and which is to take effect in possession upon the determination, by its own limitation, of an outstanding particular estate—an estate for life, or years; and it takes effect immediately on the determination of the particular estate upon which it depends, and may be alienated to the same extent, as an estate in possession.

But where a *condition* is annexed to the grant of a *fee*, the estate granted is not determined merely by a breach of the condition. It can only be determined by an *actual entry* of the grantor or his heirs; and a mere *right of entry* for a condition broken is not assignable or transferable at all.

In this case, when the condition was broken by the dismantling and abandonment of Castle Clinton as a work of defence, it was competent for the state alone to defeat, by an *actual entry*, the estate which it had granted. As no such entry was then made, the *fee*, vested in the United States, passed to the corporation of the city, and by the lapse of time, and the continuance of an adverse possession beyond the statutory period, has now become absolute,—freed from any trust or dedication, and discharged from any condition.

The plaintiffs, therefore, have no title to relief against the defendants upon the ground of a breach of *trust*. (The ground upon which the plaintiffs asked relief, in consequence of a *breach of covenant*, contained in the deed from the corporation to the purchasers of lots fronting the Bowling Green and on State-street, was principally considered by OAKLEY, Ch. J., in which DUXEY, J., in some additional remarks, concurred, and found adversely to the plaintiffs.)

Neither were the plaintiffs entitled to an injunction, in order to prevent the *nuisance*, which it was apprehended would be created, if the commissioners of emigration should be permitted to execute their intention of converting Castle Garden into a depot for the landing of emigrants.

Because the court has no right, under the circumstances, to entertain the question of *nuisance* at all, as that question has been settled by the act passed by the legislature on the 18th of April last, clothing the commissioners of emigration with fuller powers than they had before possessed; and unless the act can be pronounced a nullity, the court is bound to see that it shall not be defeated.

That act makes it the positive duty of the commissioners to designate some one place in the city of New-York for the landing of emigrant passengers, and declares that the place so designated *shall be*, not such as a court or jury may deem suitable, but *such as they may themselves deem proper*, evidently meaning that their determination should be conclusive.

The powers of our own legislature, in respect to the alteration of the common

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law, are just as unrestricted as those of the English parliament; and hence, if the act of April had declared in terms, (which it has done in effect,) that the landing of emigrant passengers at Castle Garden should not be considered and treated as a nuisance, and that no injunction to restrain such landing should be issued, no one would probably have disputed its validity.

A power which is possessed and has frequently been exercised by a municipal corporation, cannot reasonably be denied to the legislature.

From the depositions read in this case, it was considered by the court that the act of April last should be regarded, not merely as valid, but as a wise, salutary and beneficent exercise of legislative power.

General Term, July, 1855.

Before OAKLEY, Ch. J., DUER, and CAMPBELL, Justices.

THIS was an appeal from an order at special term, denying an injunction.

Messrs. PERRY & F. B. CUTTING, *for appellants.*

Messrs. ANDERSON, DEVELIN, O'CONOR, and O. HOFFMAN, *for respondents.*

By the court—DUER, Justice. I entirely concur in the opinion of the chief justice, and in the reasons which he has given; but there are other considerations which press with much force on my own mind in support of the conclusion that the injunction prayed for ought not to be granted, and these I shall proceed to state.

It is scarcely necessary to say anything more on the subject of the covenant contained in the deed from the corporation to the purchasers of lots fronting the Bowling Green and on State-street. The covenant by its terms is restricted to grounds then "vacant," and then "belonging to the corporation;" and as the premises in question, comprising Castle Garden, were not then vacant, and did not then belong to the corporation, it is plain that the covenant will not be violated, by their appropriation to any use to which the corporation, or the commissioners of emigration, may think proper to devote them.

The supposition that in equity, although not at law, the covenant may be construed as extending to and embracing the premises, is purely gratuitous; we do not believe that a case is

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to be found in which it has been held that a construction may be given to a covenant. I do not speak of a limitation in a court of equity, at all, different from that which would be given to it in a court of law. The only rule of construction, in both courts, is the actual intention of the parties, as collected from the words they have used. And certainly there are no words in the covenant relied on, from which it can be inferred that the parties intended that the covenant should embrace any lands to which, at any subsequent time, the corporation might acquire a title. Had such an intention existed, I must think it would have been expressed. At any rate, we have no power to supply it by conjecture.

I pass, then, to the second ground upon which it is insisted that an injunction, as prayed for, ought to be granted. It is said to be necessary to prevent a violation of the trust created by the act of the legislature, from which it is assumed that the corporation derive their title to Castle Garden. I mean the act of March 27, 1821, which declares, that the lands thereby granted to the mayor, aldermen, &c., and their successors, were vested in them "forever, to remain for the purpose of extending the said Battery for a public walk, and for erecting public buildings, and works of defence thereon."

Upon the supposition that what has been called the reversionary interest of the state in Castle Garden passed to and became vested in the corporation by virtue of this act, the answer that has been given by the chief justice to the argument of the plaintiffs' counsel is of itself conclusive. The words of the act do not create a trust for the benefit of individuals, and which private persons, as *cestuis que trustent*, are competent to enforce. They are simply a dedication of the lands granted to the use, for the specified purposes, of the public at large, and the title, whether legal or equitable, thus acquired by the public, has been effectually barred by the adverse possession of the corporation for a period of over thirty years.

But I shall not confine myself to this answer. I reject entirely the supposition upon which the argument for the plaintiffs is built, that the corporation derive their title to Castle Garden

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from the act of 1821. I am very clearly of opinion that no such title was meant to be given, or could be given, by the legislature when the act was passed. The state had then no title, estate, or interest in or to the lands on which Castle Garden is erected, which could be the subject of transfer.

1st. As to the words of the act—and that we may understand them—it is necessary to bear in mind the actual condition of the premises now called Castle Garden, both as to title and possession at the time the law was passed. In November, 1807, the corporation granted to the United States a small portion of the original Battery, the bounds of which it is needless to specify, fronting Castle Garden, and also a water-lot lying westwardly, "to be made land, and gained out of the Hudson River, of the breadth of three hundred feet,"—which water-lot, however, it appears to be certain the corporation had no power to grant at all, it being admitted by the counsel of all the parties, that the title to all the lands under water in front of the Battery was, at this time, vested exclusively in the state. This defect of title the legislature supplied.

By the 2d section of an act passed in March, 1808, certain commissioners, appointed under a former act, were empowered "to grant to the United States, for the purpose of providing for the defence of the city, the use of any of the lands and waters belonging to the people of the state, in the city and county of New-York; which lands," (the act proceeds to state,) "shall be granted on the express condition of their reverting to the people of this state, in case they are not applied to the purposes aforesaid." (Sess. L. 1808, ch. 51.)

The commissioners, in execution of the power thus given, in July following made a deed of cession to the United States, of lands under water in front of that part of the Battery which had been granted by the corporation, and extending westwardly into the river to the depth of five hundred feet, thus covering the whole of the water-lot which the corporation had assumed to convey. The government of the United States entered immediately upon the lands thus ceded, filled up a portion of them, connecting them by a bridge with the Battery, and erect-

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ed on the ground thus gained from the river an extensive fortification, known for many years as Castle *Clinton*, being the same building now known as Castle Garden; and in 1821, all the lands thus granted by the corporation and the state, were still in the exclusive possession and occupation of the United States.

Such being the condition of the premises when the act of 1821 was passed, let us now give our attention to the words of the act. The first sentence of the first section declares, that "it shall be lawful for the mayor, aldermen, &c., of the city of New-York, to extend that *part of the said city usually called the Battery* into the bay, and into the North and East rivers such distance as they may deem proper, not exceeding six hundred feet;" and the next sentence then vests in the corporation, for the purposes already mentioned, all the title of the people of the state to all the lands that the proposed extension was meant to cover.

The question which arises upon this section plainly is, what we are to understand by the words, "all that part of the city usually called the Battery"—since it is this part alone which the corporation have authority to extend, and it is to the extension of this part alone that a title from the state was meant to be passed. Certainly the words in question do not embrace Castle Garden, or any part of the lands ceded to the United States; for it is not pretended that these were, or ever had been, a part of the Battery, usually or properly so called; and it would be an extravagant supposition that any authority was meant to be given to the corporation, to make an extension into the bay or river in front of the grounds upon which Castle Clinton was then standing; that is, to extend, not the Battery, but the lands of the United States, and upon which, without the consent of the United States, the corporation had no right to enter at all.

Do the words then embrace that part of the Battery which the corporation had before granted to the United States? The necessary reply to this question, it seems to me, is the same as to the former—certainly not. An authority to extend the Bat-

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terry six hundred feet implies, that no such extension had then been made; but such an extension of that part of the Battery which belonged to the United States was no longer possible, to the extent of five hundred feet, with the exception of the small space of water covered by the Bridge—it had already been made. Moreover, the corporation could have no power to extend a part of the Battery not belonging to themselves, nor in their possession. Nor can we be justified in saying that the legislature meant to invade the rights of the United States, by granting such an authority; for it is to be observed, that it is a present and absolute, not a future and contingent authority, that the act of 1821 plainly confers. It is an authority that, if exercised at all, might be exercised at once. Its exercise was not meant to be suspended until the United States should cease to be the owners of the lands, that had been ceded to them.

The true explanation of the words, “*that part of the city usually called the Battery*”—although I believe it is not given in any of the depositions—is not difficult to be stated. It is found in the deed given by the corporation in 1815, to the purchasers of the lots on the Bowling Green and on State-street. The covenant in that deed describes the lands, to which it relates, as “vacant grounds belonging to the corporation in the vicinity of the premises granted, and *commonly called the Battery.*” I see no reason to doubt that the words, “usually called the Battery,” have the same meaning in the act of 1821, and ought therefore to be construed as applying exclusively to grounds then vacant, and then belonging to the corporation. Assuredly the word “Battery” had not a different meaning in 1821, from that which it is known to have borne in 1815. As it then excluded the lands ceded to the United States, it continued to exclude them.

If these observations are just, the necessary conclusions are, that Castle Garden cannot be treated as an extension of the Battery under the act of 1821, and that the corporation do not derive their title to it from that act, and do not hold it subject to the supposed trust which that act created. In my judgment,

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the origin of the title of the corporation, is the act of congress of March, 1822, and the surrender and delivery of the possession which, under that act, was made to the corporation by General Scott, in 1823. From that time, all the lands comprising Castle Garden, originally ceded to the United States, have been treated and used by the corporation as the property of the city, not subject to any trust or dedication whatever; and hence, by an adverse possession, which has now lasted more than twenty-five years, the title of the corporation has become absolute, not only as against individuals, but as against the public, and the state itself. It is a mistake to suppose that the title of the corporation is weakened by not referring it to the act of 1821. On the contrary, it is strengthened and confirmed. It is freed from restrictions by which it might otherwise be embarrassed.

So far, my opinion as to the construction and effect of the act of 1821, is mainly founded on the terms of the law. But, as I have before intimated, I go further, and shall proceed to show that, in 1821, it was not in the power of the legislature, whatever might have been its intention, to convey to the corporation any title to the lands, or any part of the lands which, under the act of 1808, had been ceded to the United States. After that cession, the state was in no sense the owner of those lands. It had no estate or interest in them whatever, which could be the subject of a valid transfer. The deed of cession made by the commissioners of the state is not before us, but we are bound to presume that it corresponded in its terms with those of the act from which they derived their authority. It was, therefore, a grant of the lands, or of the use of the lands, which it described, "upon the express condition of their reverting to the people of the state, in case they should not be applied to the purposes intended;" that is, the defence and safety of the city and harbor. And I confess my surprise that any question should be raised as to the legal operation of such a conveyance. It is quite immaterial whether the grant was of the use of the lands or of the lands themselves, since, whatever may be the form of expression, a grant which trans-

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fers the right of possession for an indefinite period, and which may remain in force forever, unless defeated by a future contingent act or event, creates a fee, and no other or less estate. Every estate which, although it may be determined upon a contingency, has no positive limit to its duration is a fee, and by no other name can it be qualified. In other words, the legal definition of a fee embraces every estate which is not for life, for years, or at will. Every estate which in its nature is descendible. It is true, that the fee which, by force of the deed of cession, became vested in the United States, was not absolute, but conditional. It was a fee upon a condition subsequent; and there is a great weight of authority in support of the position for which the defendants' counsel contended, namely, that when, by the erection of Castle Clinton, the lands ceded, were applied to the purposes intended, the condition annexed to the estate was fulfilled, and the title of the United States became absolute. We all think, however, that it is a more reasonable construction, to hold that it was the intention of the legislature that the state should be entitled to resume the possession if, at any future time, the lands should cease to be applied to the purposes for which they were ceded; and that this construction is entirely consistent with the words of the act by which the cession was authorized.

But adopting this construction of the act of 1808, and of the subsequent deed of cession, it is still certain that, in 1821, no estate, title, or interest, remained in the people of the state, which the legislature was competent to alienate or transfer. The condition, indeed, speaks of the lands granted, *reverting* to the people of the state in the event of a breach, but the words cannot be understood as creating a *reversion*, in the legal sense of the term, since there can be no reversion upon a fee, whether the fee be absolute or defeasible. A reversion, in its legal signification, is applicable only to an estate which remains in the grantor and his heirs, and which is to take effect in possession upon the determination by its own limitation of an outstanding particular estate—an estate for life or years. But, in the case before us, as the fee passed to, and became vested in, the

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United States, all that was reserved to the people of the state, was a right to enter and resume the possession, in case the lands ceded should cease to be applied to the purposes intended, and between a right of entry for the breach of a condition, and a reversion, there is a strongly-marked and wide distinction. A reversion takes effect immediately on the determination of the particular estate upon which it depends. The reversioner becomes, then, by mere operation of law, the absolute owner, and, during the continuance of the particular estate, the reversion is subject to alienation in every mode and form, and to the same extent, as an estate in possession. But where a condition is annexed to the grant of a fee, the estate granted is not determined merely by a breach of the condition. It can only be determined by an *actual entry* of the grantor or his heirs; and I consider the law as fully settled, that a mere right of entry, for a condition broken, is not assignable or transferable at all, since, when there is no limitation over, it is only by the grantor, and his heirs, that the right can be exercised.

In the case before us, when the condition was broken by the dismantling and abandonment of Castle Clinton as a work of defence, it was competent to the state alone to defeat, by an actual entry, the estate which it had granted. As no such entry was then made, the fee, vested in the United States, passed to the corporation of the city, and by the lapse of time, and the continuance of an adverse possession beyond the statutory period, has now become absolute, not only freed from any trust or dedication, but discharged from any condition.

I have not thought it necessary to support the positions I have advanced by a reference to adjudged cases. They are in truth familiar and elementary law, and are stated as such by all the text writers of authority, and more especially by BLACKSTONE, KENT, PRESTON and CRUISE. (2 Black. Com. 1566; 4 Kent's Com. 125-127; 2 Preston on Abs. of Title, 185; Cruise's Digest of Estates on Condition, *vide* Carson; 1 R. S. 722; 3 R. S. 2d ed.; notes of Revisors, 594.)

It having been shown that the plaintiffs have no title to relief upon the grounds of a breach of covenant, or of a trust, the

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only question that remains to be considered is, whether we are bound to grant an injunction, in order to prevent the nuisance, which it is so greatly apprehended will be created, if the commissioners of emigration shall be permitted to execute their intention, of converting Castle Garden into a depot for the landing of emigrants. And the first inquiry here is, whether, under existing circumstances, we have any right to entertain the question of nuisance at all. I am satisfied, upon reflection, that we have no such right. I am satisfied that the question has already been settled, and by an authority that we are bound not only to respect, but obey. It has been settled by the act passed by the legislature on the 18th of April last. It cannot be doubted, that the legislature intended, by the passage of this act, to relieve the commissioners of emigration from the difficulties and embarrassments in which the decision of Mr. Justice HURLBUT, in *Brown agt. The Mayor, &c.*, (3 Barb. S. C. Rep. 256,) had involved them; and for that purpose, to clothe them with fuller powers than they had before possessed; and it is this intention, unless the act can be pronounced a nullity, that we are bound to see shall not be defeated.

Under the act which was in force when Mr. Justice HURLBUT made his decision, the commissioners of emigration were authorized—not commanded—to lease or purchase some suitable dock or pier, in the city, for the exclusive purpose of landing thereon emigrant alien passengers; and the power thus given, was plainly so expressed as to leave the question, whether the dock or pier, selected by the commissioners, was or was not a suitable place, to be determined by a court of justice, on the application of the ordinary rules of law. But the words of the act of April last are widely different, and clearly manifest a different intent. They make it the positive duty of the commissioners to designate some one place in the city of New-York, for the landing of emigrant passengers, and declare that the place so designated shall be, not such as a court or jury may deem suitable, but such as they may themselves deem proper, evidently meaning that their determination, as to the place, shall be conclusive, and as such not liable, unless for corrup-

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tion or fraud, to be set aside by a court of justice. As the terms of the statute are imperative, that the commissioners shall designate some one place for the purpose intended, it is plain, that in making the designation, they act merely as the agents of the legislature. The general rule is, therefore, applicable, that the act of an agent, within the scope of his authority, is, in judgment of law, that of his principal; and I am, consequently, unable to see why the effect of the determination of the commissioners is not precisely the same, as if the place designated by them, had been inserted *in terms* in the law itself.

In my opinion, it is the legislature that has declared that Castle Garden shall be the sole place for the landing of emigrant passengers. When commissioners are appointed by the legislature, as frequently they have been, to determine the site of a county court-house, no one doubts, although the choice is made by them, that the site is, in reality, fixed by the legislature, since it is by the will of the legislature alone that their act is rendered effectual. It seems to me that the cases are not distinguishable.

The intention of the legislature, that the determination of the commissioners shall be held conclusive, is manifest, still more clearly, by the words that follow the grant of authority, in that section of the act which I have quoted. They are, that "*it shall be lawful for such passengers (i. e. emigrants) to be landed at the place so designated by the commissioners of emigration.*" It is quite true, that it is competent for the judiciary, in some cases, to declare an act of the legislature wholly void; but I deny, that in the case before us, we have any power to declare that to be *unlawful* which the legislature has said shall be *lawful*. And it is this which, in effect, we are required to do by prohibiting the contemplated use of Castle Garden, upon the ground that it will create or operate as a nuisance. Can we frustrate the intentions of the legislature, by taking from the commissioners the power that has been given to them? Can we rescind the act of April, by rendering inoperative and void all its material provisions? As it is not pretended that these provisions are re-

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pugnant to those of the constitution of the state, or of the United States, or that they involve a violation of vested rights, is there any ground upon which such an exercise of judicial power can be justified? I apprehend that there is none.

We have, however, been told that even the legislature has no right to create or establish, or authorize the creation or establishment of a nuisance, and consequently, that if convinced that the occupation of Castle Garden as an emigrant depot, will operate as such, it will be our duty, by a peremptory injunction, to prevent the mischief.

In support of these positions, we were referred to certain cases in England, in which it has been adjudged, that "the crown has not a right to use the title to the soil between high and low-water mark as a nuisance, or to place upon that soil what will be a nuisance to the crown's subject; and that the right which the crown does not itself possess, it cannot transfer to others." But with the highest respect for the learned judge from whose order this appeal is taken, who, in his opinion, at special term, seems to have yielded to the authority of these cases, I cannot but think that they are wholly inapplicable, and that there exists between them and the present a vital distinction, to which his attention could not have been directed. The king of England, in disposing of the property of the crown, is subject to the same rules of law that govern the use and disposition of property by private persons. He cannot release himself from the observance of those rules, nor by his sole authority change or modify them. But the parliament of England is subject to no such restrictions; all the rules of the common law are subject to alteration at its pleasure; and hence, should an act of parliament authorize the erection of a nuisance, and prohibit courts from considering and treating it as such, it may be affirmed with confidence, that no judge or court would venture to grant an injunction in defiance of its provisions.

The powers of our own legislature in respect to the alteration of the common law, are just as unrestricted as those of the English parliament; and hence, if the act of April had declared, in terms, that the landing of emigrant passengers at Castle Gar-

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den should not be considered and treated as a nuisance, and that no injunction to restrain such landing should be issued, it is not probable that any would have been found to dispute its validity. In my opinion, it is exactly this which the legislature, in effect, has said, that the landing of such passengers, at the place designated by the commissioners of emigration, shall be lawful; and to deny that such is the true construction of the words, is to rob them of all their significance. It is to place the commissioners precisely in the same condition as if the act of April had never been passed.

Let it, however, be admitted, as a general rule, that the legislature has no right to create, or authorize the creation of, a nuisance, it seems not possible to deny, that there are special cases that must be considered as exceptions from the rule. It cannot be denied, that cases may arise in which a just and enlightened regard to the interests of the public at large, and even of the inhabitants of a single city, may justify the erection of that which, in its consequences, may prove a nuisance to those who reside in the neighborhood in which it is established. A power which is possessed, and has frequently been exercised by a municipal corporation, cannot reasonably be denied to the legislature.

This was well illustrated by the instance put by Mr. O'Conor. During the prevalence of the cholera, or other contagious disease, the corporation of this city has been accustomed to establish hospitals for the reception of the diseased, in different parts of the city; and the propriety and even necessity of such an exercise of its powers has never been called in question. Every such hospital, however, is more or less of a nuisance to those who reside in its vicinity; but as the general interests of the community, and the plainest dictates of humanity require them to be established, the inconvenience, discomfort, and dangers resulting to a particular class of persons, are overlooked and disregarded. The maxim applies—*salus populi suprema lex*. The same reasoning, it seems to me, may be applied to justify the recent act of the legislature, and the proceedings under it of the commissioners of emigration.

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The commissioners state, in their deposition, that the selection of a single depot, for the landing of emigrant passengers, is, in their judgment, an expedient, and even necessary measure. Necessary to enable them to perform the duties which the law imposes upon them, by making such a separation of the different classes of emigrants, as will protect the city and state against the expense of maintaining those who are likely to become chargeable as paupers, immediately on their arrival. Necessary to enable them to make, by their physicians, such a thorough examination into the condition and state of health of the emigrants, as will avail to guard the city against the introduction of contagious diseases. And necessary to enable them to extend to the emigrants that protection against the numerous frauds from which they have hitherto suffered, to which, in the opinion of the legislature, these ignorant and friendless strangers are fully entitled.

Of the truth of these representations of the commissioners, and which are the same that they state themselves to have made to the legislature, I am entirely convinced, by the depositions that have been read; and I cannot, therefore, but regard the act of April not merely as a valid, but as a wise, salutary and beneficent exercise of legislative power.

For the reasons that I have now given, I am of opinion that the injunction prayed for could not properly be granted, even had it been clearly proved, that the conversion of Castle Garden into an emigrant depot will operate as a nuisance to all who reside in the vicinity. Such, however, is by no means the result of the evidence before us; but, on the question of actual nuisance, I deem it unnecessary to make any observations in addition to those that have been made by the chief justice.

The apprehensions which the plaintiff and his witnesses express, are no doubt sincerely entertained; but I am persuaded that experience will prove them to be wholly groundless.

We all agree, that the order at special term, denying an injunction, must be affirmed, but without costs on the appeal.

Phillips & Northrup agt. Hagadon and wife.

SUPREME COURT.

WILLIAM PHILLIPS and JOHN H. NORTHRUP agt. DAVID HAGADON and ISABELLA his wife.

Although the insanity of modern legislation has sought to make a married woman a *single female*, yet it must be distinctly understood, by business men and the profession, that a married woman is *not bound* by an *executory contract*; and that her *note* is now, as heretofore, *absolutely void*.

A *joint demurrer* cannot be sustained by two or more defendants, on the ground of defect of parties, because there are *too many* defendants; particularly, when they have all united in the contract on which the plaintiff declares; though the contract as to some one or more of the defendants may not be binding.

The acts of 1848-9, in reference to married women, have not changed the rules of *pleading*. Nor should those acts be held to affect the rights of married women, except by the strictest construction of their provisions.

Dutchess Special Term, Nov., 1855.

THE complaint in this case states, that the defendants are husband and wife; that they executed their promissory note, payable to the plaintiffs, for the sum of \$480.25, sixty days after date; that the note was given for goods, wares and merchandise, purchased of the plaintiffs by the defendant, Isabella, the wife of David Hagadon, the other defendant; who was doing business in her own name, and on her own account, apart from her husband; and that she executed the note with the consent and approbation of her husband. It then concludes by demanding judgment against both defendants.

The defendants demur, and specify for grounds of demurrer,

1. That there is a defect of parties defendants, in this, that the defendant, Isabella Hagadon, is, and was the wife of the defendant, David Hagadon, at the time of the purchase of the goods and the making of the note.

2. That the complaint does not state facts sufficient to constitute a cause of action.

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A. WAGER, for plaintiffs.
JACKSON & WILKINSON, for defendants.

DEAN, Justice. The credit given by the plaintiffs to the defendant, Isabella Hagadon, and the action founded thereon, is one of the legitimate consequences of the insanity of that modern legislation which has sought to make a married woman a single female. It is, however, time for business men, and the profession, to understand, that a married woman is not bound by an executory contract, and that her note is now, as heretofore, absolutely void.

I regret that the demurrer in this case is not in such a form that a final judgment can be given upon it, which would settle the rights of the parties. But that is now impossible. I do not think a joint demurrer can be sustained by two or more defendants on the ground of defect of parties, because there are too many defendants, particularly when they have all united in the contract on which the plaintiff declares, though the contract, as to some one or more of the defendants, may not be binding.

Had the wife demurred separately, on the ground that, as to her, there were not sufficient facts stated to constitute a cause of action, I would have sustained the demurrer. But as the demurrer is joint, and as the husband, though not liable on the contract of purchase, may be on the note, the demurrer must be overruled.

I must not be understood as even intimating that a husband is liable for goods furnished the wife for the purpose of trade on her own account. These goods, some of them, may have been necessaries; or she may have been acting as the agent of the husband in the purchase, in which event he would be liable, and there could then be no question as to the consideration of the note. But as the defendants, and each of them, can take the necessary objections at the trial, to raise these questions, I do not decide them now.

The plaintiffs must have judgment on the demurrer, with leave to answer on the usual terms.

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It is scarcely necessary for me to add, that the facts stated in the complaint are wholly insufficient to charge the separate estate of the wife. The acts of 1848-9, in reference to married women, have not changed the rules of pleading. Nor should those acts be held to affect the rights of married women, except by the strictest construction of the provisions thereof.

SUPREME COURT.

JOHN H. CROOK agt. OTIS JEWETT and HIPPOLITE MALI and others.

For the damage sustained by a *stockholder*, from illegal and fraudulent acts of *directors* and *officers* of a company, an *action* may be sustained by the stockholder against the officers and directors.

And the defendants may be *arrested* under the second subdivision of § 179 of the Code.

New-York Special Term, Dec., 1854.

MOTION to discharge from arrest.

— — — *for motion.*

— — — *opposed.*

MORRIS, Justice. Defendants, upon the plaintiff's affidavit, upon which the order of arrest was granted, move to discharge the arrest.

The affidavit of the plaintiff, among other things, establishes that the plaintiff owns two hundred shares of the stock of the Parker Vein Coal Company, of the par value of \$100 per share. That the Parker Vein Coal Company was incorporated by the state of Maryland "for the purpose of working mines of coal and iron, and vending the proceeds of the same;" that the corporation owned "and were possessed of a large and valuable

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property, consisting of lands and mines of coal and iron, situate in the state of Maryland," and also of a number of steamships; that these defendants were directors of the company, and the one (Mali) president, the other (Jewett) vice-president of the company, and both of them, with other defendants, were directors; had custody and control of the property of the company, and the right to manage its concerns in accordance with the law incorporating it; that the defendants, as such directors and officers, illegally and fraudulently sold large numbers of acres of valuable coal lands of the corporation, to a company called the Caledonia Mining Company, for which, all they received was stock of the last-mentioned company; that, as such directors and officers, the defendants illegally and fraudulently sold all the steamships of the corporation to a company called the Parker Vein Steamship Company, at an inadequate price; that the defendant, Jewett, now assumes to be, individually, the owner of the ships, and has the custody and control of them; that these defendants were, at the time of these transactions, officers and directors of the three companies; that the capital stock of the Parker Vein Company is, by its charter, limited to \$8,000,000, to be divided into shares of \$100 each, being 30,000 shares; and that these defendants have illegally and fraudulently issued, in addition to the 30,000 legal certificates of the stock of the company, 180,000 false and spurious certificates of stock; which false and spurious certificates of stock they have sold, and appropriated the avails thereof, being over \$1,000,000, to their own use; that owing to these fraudulent acts of the defendants, plaintiff's 200 shares have become valueless.

For the damage sustained by a stockholder, from illegal and fraudulent acts of directors and officers of a company, an action may be sustained by the stockholder against the officers and directors. So this court, at general term, has held, in what are known as the *Berran Island* case, the *Washington Market* case, the *Broadway and 2d Avenue Railroad* cases.

The bail, in this case, however, must be reduced, because the damage which plaintiff would be entitled to recover, would

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only be the difference between the actual value of his stock before the frauds were committed, and the value of the stock as reduced by the effect of those frauds.

I do not consider that the receipt by the defendants of over \$1,000,000 paid to them for 180,000 false and fraudulent certificates, gives to the stockholder any claim for damages, for the reason, that the false certificates convey no stock; are not evidence of ownership of stock; the money received for them could not be the property of the company; the stockholders have no interest in it; and the company or stockholders, as such, cannot be made responsible for it.

The law of the legislature creating the company—its charter confines every act of stockholders, directors and officers to the rights, duties and powers given by that law.

This charter is a written power of attorney, defining the powers that are delegated, and cannot be enlarged, altered, or modified, either expressly by parol, or by permission. This power of attorney is known to all; for ignorance of the law is no excuse for crime, or shield against injury.

I put my continuance of the arrest, in this case, upon the ground that the fraudulent and illegal sale of the coal mines and steamships were a fraudulent misapplication and embezzlement of the property of the corporation by the defendants, officers and agents of the corporation, embraced within the second subdivision of § 179 of the Code.

Order of arrest continued, and bail reduced to \$5,000 for each defendant.

M'Kinney agt. M'Kinney and others, ex'rs, &c., of M'Kinney, deceased.

SUPREME COURT.

PATRICK M'KINNEY agt. WILLIAM M'KINNEY and others executors, &c., of DANIEL M'KINNEY, deceased.

Where the defendants, before the time for answering expired, demanded a copy of the items of the plaintiff's account, which was furnished by the plaintiff; and the defendants then moved, under § 160, that the plaintiff be required to make his complaint definite and certain.

Held, that the motion, if allowable at all in such a case, came too late. If the defendants were dissatisfied with the account furnished, they had but to apply to the court, or a judge, and upon showing that the account was in any respect defective, they would be entitled to an order that a *further account* be delivered.

It seems, that where the allegations of the plaintiff's claim are so general, that it will be important to the defendants, before answering, to have a more detailed statement of such claim, and for which provision is made in § 159, that a *motion*, under § 160, to make the complaint more definite and certain, even in the *first instance*, does not apply.

Albany Special Term, Aug., 1855.

MOTION that plaintiff be required to make his complaint definite and certain.

The complaint contained *four* counts. In the *first*, it was alleged, that Daniel M'Kinney, at the time of his death, was indebted to the plaintiff to the amount of \$1,200, for moneys paid, laid out and expended by the plaintiff for him, and moneys received by him for the use of the plaintiff. In the *second*, that he was indebted to the plaintiff in the sum of \$200 for costs and expenses incurred, paid and expended in protecting his property from sale under execution or attachment against Andrew M'Kinney, and in defending an indictment and other actions against the plaintiff theretofore. In the *third*, that Daniel M'Kinney, at the time of his death, was indebted to the plaintiff in the sum of \$2,500 for work and labor, &c. In the *fourth*, that he was indebted to the plaintiff, at the time of his death,

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in the sum of \$67, for one cow and six yearling calves, sold and delivered to him by the plaintiff.

The defendants, before the time for answering expired, demanded a copy of the items of plaintiff's account, which was furnished. After the service of the account, the defendants' attorney gave notice of this motion, and asked for an order requiring the plaintiff to set forth in what particular business the money mentioned in the complaint was expended, and the particular time of the expenditure, and the amount thereof, and from whom and at what time the money was received by Daniel M'Kinney for the plaintiff's use, and the amount thereof, and the times and particular sums of money lent and advanced by the plaintiff to the said Daniel M'Kinney, and when, how, and under what particular circumstances said costs and expenses were incurred, and the several amounts in each action, and by what agreement, and when, in what business and under what agreement the labor was performed, &c., for said Daniel M'Kinney, and when the cow and calves were sold and delivered to him, and under what agreement, and the price or value of each.

T. B. MITCHELL, *for plaintiff.*

A. HOUGH, *for defendants.*

HARRIS, Justice. It may be, that had the defendants applied, in the first instance, to compel the plaintiff to amend his complaint, the application would have been successful. *Blanchard agt. Strait*, (8 How. 85,) is an authority in support of such an application. And yet I am inclined to think, that the provision of the 160th section of the Code, authorizing the court, when the allegations of a pleading are so indefinite or uncertain that the precise nature of the charge or defence is not apparent, to require the pleading to be made definite and certain by amendment, is not at all applicable to a case like this.

The plaintiff alleges that the estate represented by the defendants, owes him a specified sum for money disbursed by him for the decedent in his lifetime, and for money received to his

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use by the decedent. The allegation, it is true, is very general. It may be important to the defendants that, before answering, they should have a more detailed statement of the plaintiff's claim. But I do not think it can be said that the allegation is so indefinite or uncertain, that the precise nature of the plaintiff's charge is not apparent. And so of the allegations in the other counts of the complaint. They are general, and the defendants would, doubtless, need a more particular statement. For this, provision is made in the 159th section of the Code, which declares that the plaintiff, when he seeks to recover the amount of an account, shall not be required, in the first instance, to set forth the particulars of such account. He may state, in general terms, the nature of his charges. But, upon being required to do so by the defendant, he is obliged to go further, and furnish the items in detail. This the defendants have already required the plaintiff to do. This the plaintiff, complying with the requirement, has done.

It is too late, now, for the defendants, after having thus obtained a specification of the plaintiff's demand, to ask to have the plaintiff compelled to amend his complaint, by making the allegations more definite and certain. If they are dissatisfied with the account furnished, they have but to apply to the court or a judge, and, upon showing that the account is, in any respect, defective, they will be entitled to an order, that a further account be delivered.

This motion must, therefore, be denied, with costs.

Livsey agt. Landers.

NEW-YORK COMMON PLEAS.

LIVSEY agt. LANDERS.

Where an execution has been issued against the property of the defendant, and returned unsatisfied, and on an allegation that the debt for which the judgment was obtained was *fraudulently* contracted, an execution against the *person* of the defendant cannot issue, unless it appears that the *action* was one in which the defendant might have been *arrested*.

And this applies to actions commenced and judgments originally rendered in a justice's court, where transcripts have been filed in the county or common pleas court.

New-York Special Term, Jan., 1856.

MOTION to vacate order directing an execution against the person to issue.

— — — *for motion.*
— — — *opposed.*

BRADY, Judge. The order directing an execution against the person of the defendant in this action, was made under § 288 of the Code of Procedure, which is as follows:—

"If the *action* be one in which the defendant *might have been arrested*, as provided in §§ 179 and 181, an execution against the person of the judgment-debtor, may be issued to any county within the jurisdiction of the court, after the return of an execution against his property unsatisfied, in whole or in part,"— and upon the allegation that the debt, for which the judgment had been rendered, was fraudulently contracted.

The action was commenced in the justice's court for the 3d district of the city of New-York, to recover for services rendered and materials found, and a transcript of the judgment rendered therein, filed, as provided by § 68; but although by that section the judgment of that court, by filing a transcript thereof, is *to be deemed* a judgment of the court of common pleas, and enforced in the same manner, the *action* so com-

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menced was not one in which the defendant *might have been arrested*. That court had no jurisdiction to arrest the defendant. (*The People ex rel. Corlis agt. Smith*, 9 How. Pr. R. 464.)

For this reason, without reference to the questions suggested on the motion, the order allowing the execution to issue must be vacated, and the execution issued thereon set aside, with \$10 costs—the defendant stipulating not to sue.

SUPREME COURT.

THE ROCHESTER CITY BANK, respondent, agt. JOHN RAPELJE and another, impleaded, &c., appellants.

Upon the decision of a demurrer, noticed as frivolous under § 247 of the Code, the prevailing party on the judgment is not entitled to tax (\$15) for a trial fee of an issue of law. It is not the trial of an *issue*.

Monroe General Term, Dec., 1855.

JOHNSON, SELDEN and WELLES, Justices.

APPEAL from order of special term denying motion for re-adjustment of costs.

The complaint was on a promissory note, made by the defendants, to which the defendants demurred. The demurrer was noticed as frivolous before a justice of this court, under § 247 of the Code, and was held to be frivolous, and judgment was given under that section for the plaintiff, nothing being said in the order about costs.

The plaintiff thereupon perfected judgment, had his costs adjusted by the clerk of Monroe county, in which he charged and was allowed for proceedings, after notice of trial, as follows:—

For all subsequent proceedings before trial,	- - - - -	\$ 7.00
For trial of issues of law on demurrer	- - . - - -	15.00
Clerk's fee on trial	- - - - - - - - -	1.00

The Rochester City Bank agt. Rapelje and another, &c.

These items were duly objected to before the clerk. The defendants' moved at special term, for a readjustment, and this appeal is from the order denying such motion.

J. H. MARTINDALE, *for appellants.*

T. C. MONTGOMERY, *for respondent.*

By the court—WELLES, Justice. "If a demurrer, answer, or reply be frivolous, the party prejudiced thereby, upon a previous notice of five days, may apply to a judge of the court, either in or out of the court, for judgment thereon, and judgment may be given accordingly." (*Code*, § 247.)

Subdivision 3 of § 307, gives to the party entitled to recover costs, "for the trial of issues of law, if separate from the issues of fact, to the plaintiff, \$15; to the defendant, \$12."

An issue of law arises upon a demurrer to the complaint, answer, or reply, or to some part thereof. (§ 249.)

A trial is defined to be the judicial examination of the issues between the parties, whether they be issues of law or of fact. (§ 252.) An issue of law must be tried by the court, unless it be referred, &c., (§ 253,) and must be tried at a circuit court, or special term, &c., (§ 255,) and upon a notice of at least ten days. (§ 256.)

We are of the opinion, that an application to a judge for judgment, under § 247, is not a trial of an issue of law, so as to entitle the party succeeding to charge, in his bill of costs, the fee for the trial of an issue of law, under subdivision three of § 307, nor any other item, as upon a trial, for the following reasons:—

1. The application does not necessarily involve the decision of the issue; because, if the judge does not see the demurrer, answer, or reply to be frivolous, he makes no decision of the issue. He merely decides that it is not frivolous.

We agree with Justice HARRIS, in *Gould agt. Carpenter*, (7 How. Pr. R. 97-99,) that it is, in effect, a motion to get rid of a frivolous pleading, which is not the subject of a triable

Waller agt. Raskan.

issue, so that the party may have the judgment, to which, but for such frivolous pleading, he would have been entitled.

2. The application may be made upon a notice of five days, whereas a trial can only be brought on upon a notice of ten days.

3. The section allowing the application refers as well to answers and replies as to demurrers. If it is a trial in one case, it is equally so in all of them; yet no one would say it was a trial, in the case of an answer or reply.

The order of the special term must be reversed, a readjustment of the costs ordered, and the clerk directed to disallow the three items in controversy.

SUPREME COURT.

WALLER agt. RASKAN.

A cause of action arising on contract, cannot be united with one arising in *tort*.

When they are so united, the objection should be taken by demurrer.

Where, however, two or more causes, proper to be united, are stated in the same complaint, they must be stated separately; each by itself.

If they are not so stated, but are blended or intermingled in the statement, the objection should be taken by motion, under § 160 of the Code.

On such a motion, the party objecting may strike out, as irrelevant, all matter not applicable to a single cause of action.

Where two causes are thus stated, either may be struck out, and the party moving may elect as to which he will move.

It is no objection to the motion, that if it be allowed, the pleading thus preserved will be demurrable; as that the contract counted on is void as being within the statute of frauds.

The party thus moving need not select so as to leave standing, in his adversary's pleading, the cause of action which he may seem most likely to establish on the trial, but may move against either.

New-York Special Term, Dec., 1855.

THE plaintiff, in this complaint, averred a sale of goods by himself, on credit, to one Dentz; that plaintiff was, at the time,

Waller agt. Raskan.

unacquainted with Dentz, or his means or circumstances; that he was induced to make the sale by certain representations of defendant, that Dentz was solvent and responsible, in good pecuniary circumstances, and worthy of credit, and would undoubtedly pay any amount with which plaintiff might credit him; that these representations were untrue, and were known to be so by defendant at the time, and were fraudulently made, and plaintiff was thus defrauded, &c.; that defendant guaranteed the payment for said goods by Dentz, and that they had not been paid for; the whole being stated together as one cause of action, and without intimating that they were to constitute more than one.

ALLEN, HULL and STOCKER, *for plaintiff.*
Wm. M. BAYARD, *for defendant.*

PEABODY, Justice. This is a motion to strike out parts of a complaint, as irrelevant and redundant; and also because the parts objected to, state matters of fraud and deceit; and are, therefore, inconsistent with the summons, which is in the form used to commence actions for money demands on contract. The parts which defendant insists should be stricken out, are averments that defendant, on the occasion of a sale of goods to one Dentz, falsely and fraudulently made certain representations, respecting the solvency, pecuniary ability, and credit of said Dentz, which was false, with intent to mislead and deceive plaintiff, and that they had that effect by inducing plaintiff to sell him property on credit.

The rest of the complaint states a contract by defendant to guaranty the payment to plaintiff of the debt thus incurred by Dentz, and the parts applicable to the different causes of action are intermingled in the pleading. The two relate to the same sale; and on one theory the plaintiff would recover the price of the goods as the measure of the damages sustained by him, by reason of the misrepresentations of defendant; and on the other, he would recover the same amount of defendant, on the contract to guaranty the debt of Dentz.

Waller agt. Ruskay.

The causes of action being based, one in tort and the other in contract, are improperly united in one suit; but they are also each of them badly pleaded, inasmuch as they are not separately stated as separate causes of action, but are blended; and the two are stated together, as would only be proper, if they were intended to constitute but one cause of action. It is contended that the defendant should have demurred, and that, on a demurrer, he would have found the natural and adequate remedy, but that he cannot have relief on this motion. I think a demurrer would perhaps have been preferable, but he has chosen a different course, and the question to be decided is, whether he can have the relief he seeks in this form of proceeding?

The pleading is doubtless bad, and must be purged; and it is the duty of the court to give the relief, if not inconsistent with the rules regulating the practice in this respect.

The motion proceeds on the theory, that the plaintiff, having planted himself on the contract, the matter of fraud and deceit is irrelevant. It certainly is so, on this theory; and I think that the practice of the defendant, in resorting to this motion, is correct, and should be sustained.

The plaintiff having thrown these facts together in his complaint, without stating in words, or indicating by any arrangement of them, whether they were designed as the basis of one or more causes of action, the defendant is at liberty to treat them as constituting, in the intent of the pleader, only one cause; and I think, moreover, that he may elect which of the causes he will consider as intended—whether that on the contract, or that in the tort; and that, having taken his position, he may require that all matters not relevant to that cause be stricken out. The rule, that where facts are so stated in a pleading as to leave it doubtful whether they are intended to constitute one or more causes of action or defences, the party against whom they are pleaded is at liberty to have all, not material to one cause of action or defence, stricken out as irrelevant, is salutary, and should be liberally applied.

In a case like the present, I think that the defendant should

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be at liberty to avail himself of either this motion or a demurrer, notwithstanding the two proceed on opposite theories ; that of the demurrer being, that plaintiff intended to state two causes of action ; and that of the motion being, that he intended all the facts for one cause ; and if he adopt the motion, he may elect which of the causes of action he will consider plaintiff as going on, either the contract or the tort, as he may please ; and having elected, he may demand, that all matter not relevant to that cause, be stricken out.

It is true, that after striking out this, other matter, liable to the same objection, remains in the complaint ; and it is also true, that, with this matter out, the complaint will be demurrable—the contract counted on being within the statute of frauds ; but neither of these is a good reason for retaining the objectionable matter ; nor is the latter a reason for requiring the defendant to move as to the matter constituting the other cause of action, viz., that on the guaranty, rather than this on the tort.

Courts, while they discourage unnecessary motions on the subject of practice, will never shut their ears to appeals like the present, for the correction of pleadings in matters of substantial importance ; and where such correction is necessary to make it answer the ends of justice, in stating intelligibly and definitely the facts claimed to constitute a cause of action or defence, and thereby enabling the adverse party to know what he is to meet by his pleading and on the trial.

They will rather, in this manner, encourage and cultivate a more accurate and higher standard of pleading, by favoring and applying, beneficially to the party oppressed, the remedies he may invoke, so far as is consistent with established rules on the subject.

The order asked must be entered, with liberty to the plaintiff, within twenty days, to amend his complaint.

Glinsmann agt. Glinemann.

SUPREME COURT.

HENRY C. GLINSMANN agt. SOPHIA H. GLINSMANN.

A decree for divorce on the ground of *force or fraud* cannot be granted, where it appears "that, at any time before the commencement of the suit, there was a voluntary cohabitation of the parties as husband and wife." (2 R. S. 143, § 32.)

(*Quere? Whether, to meet the requirements of justice in many cases, this statute does not need amendment, if the VOLUNTARY cohabitation mentioned, does not mean a KNOWLEDGE of the fraud.*)

In this case, it would seem that the parties did not live together *after* the alleged fraud was *discovered*; and that the suit was thereafter immediately commenced.

New-York Special Term, July, 1855.

APPLICATION for a decree dissolving marriage contract for fraud.

The plaintiff and defendant intermarried in December, 1847, and, as husband and wife, lived together until August, 1854. During this period they have had two children, one of whom is now living. The plaintiff asks for a decree dissolving the marriage contract upon the ground of fraud.

The alleged fraud consists in the defendant's having, prior to the marriage, and as an inducement to plaintiff to contract it, represented herself as a chaste woman, when, in fact, she was the mother of four illegitimate children; that she concealed such fact from the plaintiff prior to the marriage, and that he only discovered it in August, 1854.

— — — for plaintiff.
— — — for defendant.

COWLES, Justice. The decree must be denied. The statute expressly inhibits the granting of one under this state of facts.

By 2 R. S. 143, § 32, it is provided, that "No marriage shall be annulled on the ground of force or fraud, if it shall appear

Graves & White agt. Lake.

that, *at any time before the commencement of the suit*, there was a voluntary cohabitation of the parties as husband and wife."

Here there has been such cohabitation from 1847 to 1854, and two children born to the parties.

Judgment must be entered denying the prayer of the plaintiff, and dismissing his complaint.

DUTCHESS COUNTY COURT.

GRAVES & WHITE agt. LAKE.

In proceedings supplementary to execution, under § 292, it is not necessary that the *debtor himself* should be examined *on oath* concerning his property. The section allows the creditor an order, (after the return of execution unsatisfied,) "requiring such judgment-debtor to appear and answer concerning his property." This is simply a provision to bring him before the judge. The examination as to the *property* of the judgment-debtor, may be made by examination, under oath, of witnesses, or of the debtor as a witness, or both, or either of them.

Dutchess County, Dec., 1855.

PROCEEDINGS supplementary to execution.

On the return of an execution unsatisfied, against the property of the judgment-debtor, an order was granted requiring the defendant to appear and answer concerning his property. On the return-day of the order the parties appeared; and the plaintiffs, after the examination of witnesses, (other than the defendant,) showing money in the possession of the judgment-debtor, independent of his earnings, within sixty days past, without examining the defendant on oath, rested their case. And the defendant moved for a dismissal of the order and the proceedings thereon, because the plaintiffs had not examined the defendant on oath concerning his property.

J. W. ELSEFFER, for plaintiffs.

S. WODELL, for defendant.

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NELSON, County Judge. It is provided by § 292 of the Code, that when an execution against the property of the judgment-debtor, issued, &c., is returned unsatisfied, the judgment-creditor, at any time after such return made, is entitled to an order, "requiring such judgment-debtor to appear and answer concerning his property." Certainly, this does not require that the judgment-debtor must answer *on oath*. In fact, if this part of the section stood alone, I could discover no authority to administer to him an *oath*, or to compel him to testify. The order to *appear and answer* is only to bring him before the judge. If the foregoing words, included within the quotation marks, made it necessary for the plaintiff to examine the defendant *on oath*; then the provision contained in the same section, that "on an examination under this section, *the judgment-debtor may be examined in the same manner as a witness*," would be unnecessary.

The whole object of this proceeding is to ascertain whether the debtor has property not exempt from execution, in the hands of himself or of any other person, or due to him; all of which facts a plaintiff might be able to establish by witnesses, independent of the judgment-debtor; and the debtor himself might be unworthy of credit as a witness. If I am right, as to the object of the proceeding, why, then, should the plaintiff be required, in a case like the present, to examine the judgment-debtor *on oath*? Certainly, there can be no necessity for it.

The words, "on an examination under this section," means *on an examination as to the property of the debtor*, by calling witnesses, or by calling, swearing and examining the debtor, *as a witness*, or both, or either, and not simply *the examination of the judgment-debtor on oath*, concerning his property.

The motion must, therefore, be denied.

Wheeler agt. Maitland and others.

SUPREME COURT.

WHEELER agt. MAITLAND and others.

Motions in a cause triable out of the first judicial district, cannot be made in that district. (*Code*, § 401.)

When an action, commenced and made triable in one county, is referred for trial to a referee residing in another county, and so described in the order, the place of trial is not thereby changed. The place of residence is merely *descriptio persona* of the referee.

The intention of the court to change the place of trial of a cause, will not be inferred from a reference to a person residing in another county than that in which it would otherwise be triable.

Especially will such an inference not be made in a suit local in its character, as for the foreclosure of a mortgage.

New-York Special Term, Dec., 1855.

MOTION, in the first judicial district, in a suit to foreclose a mortgage on land in Orange county, being the second judicial district; the case having been referred for trial to a referee in the first district, and the trial, having proceeded, being now in progress therein.

FORBES, SEDGWICK & NYE, for plaintiff.

W. H. TAGGART, for defendant, Maitland.

PEABODY, Justice. This is a motion by defendant for a commission to examine a witness abroad, and for a stay of plaintiff's proceedings a reasonable time for the execution of it. The suit is brought to foreclose a mortgage on land in Orange county, being in the second judicial district, and the venue is laid in that county. It has been, by consent of the parties, referred for trial to a referee residing in the city of New-York. This reference, it is claimed by the moving party, makes the case within § 401 of the Code, triable in the first judicial district, and authorizes the making of this motion here. Indeed, it was urged on the argument that the court in the second dis-

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trict had denied this motion, or refused to hear it, on the ground that this reference changed the place of trial, and made this the proper county in which to move.

A clause of § 401 provides that, "no motion can be made in the first district in an action triable elsewhere." So that this motion is not properly made here, unless it appears that the cause is not triable elsewhere than in this district.

It seems to me quite clear, that this is not the fact within the meaning of the Code, and that this case is triable elsewhere than in this district, and, indeed, is not, within the meaning of the Code, triable here. I cannot doubt that this referee can properly hear it in Orange county, or that it is within the meaning of the Code triable therein. It is in its nature local, and it is provided by the Code, § 123, that it "must be tried in the county in which the subject of the action, or some part thereof, is situated." There is much more ground to doubt the power of the referee to try the cause out of Orange county; and, indeed, without the assent of the parties, it is pretty clear he could not try it elsewhere than in that county, or, at least, that the order of reference does not confer the power.

Then, mere terms of the order of reference "to Stephen Cambreling, Esq., of the city of New-York," are quite insufficient to authorize it. It is probable that a sufficient assent to the place of trial in this cause, may be derived from the attendance of the parties before the referee, and proceeding with the trial, from time to time, in this county without objection. This, however, would not authorize the making of this motion here. No such assent to the place of making this motion is shown, or to be inferred, (even if such assent would be effectual,) for the plaintiff appears and expressly dissents; and it can hardly be pretended that he, by permitting the reference to proceed here, has not only assented to changing the county, where other proceedings are to be had, but has so bound himself, in this respect, that he is estopped to make the objection on this motion.

If the court in the second district have intimated, as the counsel understood, it was probably on a very hasty and im-

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perfect statement of the case, such as must occur at times in the pressure of business on counsel and courts; that court hardly intended to decide that the order referred to operated to change the place of trial, and render the case not triable in Orange county; and I am not, therefore, I am sure, uttering an opinion in conflict with any decision intended to be made there, which it would become me to do, if at all, with great diffidence.

The motion, therefore, must be denied, but with liberty to defendant to review it elsewhere, as he may be advised.

SUPREME COURT.

ISAAC A. CHAPMAN agt. PHILIP PALMER AND HENRY TILTON.

An answer (verified) by one defendant, sued as a partner with another, which states that the defendant "has not any knowledge or information sufficient to form a belief, whether the plaintiff sold and delivered to the defendants the several parcels of goods mentioned in the complaint, or any of them, or whether the sums mentioned in the complaint, or any of them, are due to the plaintiff from the defendants, and unpaid by them; and he therefore denies the same in each and every particular thereof"—must be struck out as evasive and frivolous. The defendants' *ignorance* is quite *unnecessary*.

Albany Special Term, Dec., 1855.

MOTION for judgment on account of frivolousness of answer.

The action was for goods sold and delivered to the defendants, as partners, by the plaintiff.

The complaint set forth three different purchases, amounting in the whole to \$162.85, and stated that the defendants had paid \$75 on account of such purchases. The balance, amounting to \$87.85, with interest, the plaintiff claimed to recover in this action.

The defendant Palmer, though served with summons and complaint, did not answer. The defendant Tilton, put in an answer, stating that "he had not any knowledge or informa-

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tion sufficient to form a belief, whether the plaintiff sold and delivered to the defendants the several parcels of goods mentioned in the complaint, or any of them, or whether the sums mentioned in the complaint, or any of them, were due to the plaintiff from the defendants, and unpaid by them; and he therefore denied the same in each and every particular thereof."

J. B. STURTEVANT, *for plaintiff.*

OTIS ALLEN, *for defendant Tilton.*

HARRIS, Justice. I have no hesitation in pronouncing this answer evasive and frivolous. The allegation in the complaint is, that the plaintiff, at different times during the present year, sold and delivered to the defendants, as partners, certain goods. Whether or not this allegation is true, the defendants may be reasonably supposed to know. One of them, by his failure to answer, admits that it is true. The other says, that for the want of any knowledge or information on the subject, he is unable to say whether it is true or not. As the answer is verified by the oath of the defendant, we are, perhaps, required to believe that this is so. But if it be really so, the defendant's ignorance is quite unnecessary.

Intentional ignorance is not such as the legislature had in view, when it authorized a defendant to put in issue any allegation of a complaint when he had no knowledge or information as to its truth, by stating such ignorance. The defendant who has answered, if he did not in fact know whether his partner or his clerks had purchased the goods of the plaintiff, as alleged, was bound, before answering, to inform himself on the subject. This he could have done by simple inquiry. If he has omitted such inquiry, he is wilfully ignorant of what it was his duty to know. If there was anything to prevent his informing himself, as to the facts alleged in the complaint, he should have stated what it was, by way of excusing himself for this mode of answering. In the absence of any such excuse, he must, as one of the partners, to whom the goods are alleged to have been sold, be held to be chargeable with such knowl-

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edge or information on the subject, as would enable him to admit or deny the allegation. The answer, that he has no such knowledge or information, must be regarded as an evasion. (*See Edwards* agt. *Lent*, 8 How. 28; *Richardson* agt. *Wilton*, 4 Sand. 708; *Wesson* agt. *Judd*, 1 Abbott, 254; *Thorn* agt. *N. Y. Central Mills*, 10 How. 19; *Shearman* agt. *N. Y. Central Mills*, 1 Abbott, 187.)

The motion must be granted, with costs.

NEW-YORK COMMON PLEAS.

DENNIS M'MAHON, Jr., administrator with the will annexed of RUTH S. HARRISON, deceased, agt. THOMAS E. ALLEN.

Where the plaintiff brought his suit against the defendant *individually*, to recover moneys which he alleged the defendant received while acting as the agent, or attorney in fact, of J—— H——, executor of R—— S. H——, whose estate the plaintiff claimed as *administrator de bonis non*, &c.; and, pending the action, letters testamentary were granted to the defendant upon the will of the said J—— H——.

Thereupon the plaintiff moved to amend his complaint, by making the *executor* (the defendant in his representative capacity) of J—— H—— a party defendant, alleging that a complete determination of the controversy could not be had without the presence of such executor.

Held, (passing over the *delay*, which was considered fatal,) that if the plaintiff was entitled to recover at all, he was so entitled when his suit was commenced. If he was not so entitled when he commenced the suit, facts *subsequently* occurring could not be introduced either by amendment or by supplemental complaint to make a title to recover. Besides, a judgment against the defendant, individually, would prejudice no one but himself; and a judgment in his favor would prejudice no person not a party to the suit, not duly represented by the plaintiff.

“When a complete determination of the controversy cannot be had without the presence of other parties”—means, that there are persons, not parties, whose rights must be ascertained and settled before the rights of the parties to the suit can be determined. And there are other cases in which a *defendant* may

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require other parties to be brought in for the protection of his rights; but this is his own privilege, and he may waive it.

Causes of action, seeking to charge the defendant individually, and also as executor, cannot be united.

Special Term, Nov., 1855.

THIS was a motion for leave to file a supplemental complaint, alleging, among other things, as additional matter to the original complaint, that, April 26th, 1850, the plaintiff was appointed assignee of Solomon Kipp, trustee of Ruth S. Harrison, and that, April 22d, 1853, the defendant was appointed executor of John Harrison, deceased.

The action was commenced May 7th, 1850, to recover moneys alleged to have been received by the defendant before the 10th of March, 1850, while acting as agent of John Harrison, (now deceased,) executor of Ruth S. Harrison, his wife. Subsequent to the commencement of the action, the will of John Harrison was admitted to probate, and the letters testamentary thereon issued to the defendant. The defendant denied the receipt of the money as alleged. He also insisted, that what money he had received as agent of John Harrison, executor, he was not liable to account for to the plaintiff.

The issues were referred, in February, 1852, to Stephen Cambrelling, Esq., as sole referee.

After the plaintiff closed his proofs, the defendant moved to dismiss the complaint. The referee decided the defendant was not liable; but intimated that he might be liable in his representative capacity; and recommended an application to the court to bring him in as a defendant in that capacity.

It appeared, upon the motion, that on the 12th of September, 1854, the plaintiff commenced an action also against the defendant as executor of John Harrison, to recover the moneys claimed in this action.

DENNIS M'MAHON, Jr., and

RALPH LOCKWOOD, *in support of the motion,*

Cited—*Pendleton* agt. *Fay*, 3 *Paige*, 204; *Egar* agt. *Price*, *id.* 333; *Lawrence* agt. *Bolton*, *id.* 294; *Green* agt. *Bates*,

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7 How. Pr. R. 296; *Doolittle* agt. *Erskine*, 10 Verm., 265; *Carlton* agt. *Carlile*, 5 Madd. 427; *Welford's Eq. Pl.* 188; *Code of Procedure*, §§ 402, 468, 471, 122, 144, 147, 148; *Muller* agt. *Canville*, 5 Russ. 42; *Johnson* agt. *Snyder*, 7 How. Pr. R. 895; *Hornfager* agt. *Hornfager*, 6 id. 13; *Beck* agt. *Stephane*, 9 id. 198; *Colt* agt. *Lamer*, 9 Cowen.

ALBERT MATHEWS, for the defendant,

Made the following points:—

First. The gross *laches* of the plaintiff in making this application forbid its being granted.

I. All the facts were known to him before filing his original complaint, except one, and that one (although he prevented it occurring before this suit was commenced) was known to him in April, 1853, and is immaterial, if the plaintiff's theory is correct, and no excuse is pretended for the delay. (See *Code*, § 177; *Pendleton* agt. *Fay*, 3 *Paige R.* 204; *Rogers* agt. *Rogers*, 1 *id.* 424; *Whitmarsh* agt. *Campbell*, 2 *id.* 67; *Verplank* agt. *Merchants' Ins. Co.*, 1 *Edw.* 46; *Pedrick* agt. *White*, 1 *Metcalf R.* 76.)

II. This court has refused a discovery of books and papers, on the ground of *laches* in the application. (*Edmonds* agt. *Jackson, Gen. Term.*, 1854.)

III. The superior court has refused security for costs, for same reason, although the statute *seems* to leave no discretion to refuse. (*Buckley* agt. *Florence*, 1 *Duer*, 705.)

IV. It rests in the *discretion of the court* to allow a supplemental complaint in a proper case; and the plaintiff, by his delay, has forfeited all claim to an exercise of that discretion in his favor. (*Code*, § 177.)

(a) Section 122 of the Code is inapplicable, as it is restricted to cases when the acts proposed "*can be done without prejudice to the rights of others*," and "*when a complete determination of the controversy cannot be had without the presence of other parties*."

Second. There is another action pending against the defendant, now proposed to be made a party for the same cause

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of action, now proposed to be incorporated in the supplemental complaint. This is a good defence in abatement. (*Bendenbagh agt. Cocks*, 19 Wend. 207.)

I. This would split up the demands.

Third. The proposed supplemental complaint is based upon new facts upon which (if the plaintiff's theory be correct) a judgment may be had without reference to the original complaint. The original complaint is wholly defective, and shows no cause of action against the defendant therein. In either case, the plaintiff should commence a new action. (*Smith agt. Edmonds*, 10 Legal Obs. 185; *Milner agt. Milner*, 2 Edw. V. C. R. 144; *Lloyd agt. Brewster*, 4 Paige, 588; *Byrne agt. Byrne*, 2 Drury & Warren, 71; *Coleman agt. M'Murde*, 5 Rand. R. 51.)

I. When the plaintiff commenced suit he had no cause of action against any person, no executor having been appointed of the will of John Harrison.

Fourth. To allow this complaint, would be to authorize an action contrary to the statute, indirectly against the defendant Allen, as *executor in his own wrong*, of the estate of Mrs. Harrison, while another executor was acting. (*Babcock agt. Booth*, 2 Hill R. 81; *Murr agt. The Leake & Watts' O. A.*, 3 Barb. Ch. R. 477; 2 R. S. 449, § 17.)

Fifth. To entitle the plaintiff to file a supplemental complaint, it must be in respect of the same title in the same person, as stated in the original bill. Here it is totally different. It is a new case. (*Story's Eg. Pleadings*, 339; *Erskin agt. Sethbridge*, *Cooper's Chancery Cases*, 43; *Pratt agt. Bacon*, 10 Pick. R. 122.)

Sixth. To allow this supplemental complaint to be filed, would enable the plaintiff, if successful, to gain a priority over other creditors of John Harrison, and change the order of the administration of his assets.

I. If any claim is made against Allen individually, this illegal consequence would result.

II. If no claim is made against Allen, he is not a proper party to the new or supplemental action.

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Seventh. By allowing Allen to be thus sued individually, he is deprived of his set-off, which he is entitled to in making up his accounts between himself individually and as executor. (*Mercin agt. Smith*, 2 *Hill*, 213; 2 *R. S. p.* 355, § 28.)

Eighth. The claim against the defendant, as executor, is a claim "against a trustee," and cannot be united with a claim against him individually. (*Code*, § 167; *Dox agt. Backerstone*, 12 *Wend.* 543.)

I. The causes of action are wholly distinct, and the complaint multifarious. (*Davoue agt. Fanning*, 4 *Johns. Ch. R.* 199; *Butts agt. Greening*, 5 *Paige R.* 254; *Murray agt. Hay*, 1 *Barb. Ch. R.* 59; *Jackson agt. Forrest*, 2 *id.* 576; *Story's Eq. Pleadings*, 274 (a).)

Ninth. The supplemental complaint makes an entirely new issue, and, if permitted, it should only be on payment of all costs; and it is far better the plaintiff's complaint be dismissed with costs, and he left to prosecute the suit he has already commenced against the defendant, as executor of John Harrison, for this claim and others. (*Verplank agt. Merchants' Ins. Co.*, 1 *Ed. V. C. R.* 141; *Smith agt. Smith, Cooper's Ch'y Cases*, 141; 2 *Sim. & Stew.* 113.)

NOTE.—The case of *Colt agt. Lanier*, (9 *Cowen*,) cited by plaintiff, was a case of *partnership* and of a *devastavit*. The funds of the estate were, *in part*, fraudulently converted by Colt, the surviving partner, after decease of the executor, [§4,000 U. S. stock, 18th Feb., 1815, p. 332,] and in part appropriated by a *devastavit* by said Colt. [pp. 342, 343.]

WOODRUFF, Judge. The plaintiff herein is prosecuting this suit against the defendant individually, to recover moneys which he alleges the defendant received while acting as the attorney in fact of John Harrison, executor of Ruth S. Harrison, whose estate he claims as administrator *de bonis non*, &c., and as successor to Solomon Kipp, trustee, &c.

Pending this suit, and on the 22d April, 1853, letters testamentary have been granted to the defendant, upon the will of the said John Harrison, and thereupon the plaintiff commenced a suit against the defendant, as the executor of John Harrison,

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to recover (among other property) the same moneys for which the present suit is brought.

The plaintiff, nevertheless, proceeds with this action against the defendant, as an individual, brings the cause to trial, and closes his proofs; and now, after a motion to dismiss his complaint on the ground that the defendant (as an individual) is not liable to the *plaintiff* for moneys he received as the agent for the deceased executor, John Harrison, the plaintiff, two years and four months after he had full notice of all the facts, moves for leave to make the executor of John Harrison a party defendant. It seems to me, that if there were no other reasons for denying the motion, the delay would be sufficient.

But there are other reasons which constrain me to such denial, which may be very briefly stated.

If the plaintiff is entitled to recover at all in this action, he was so entitled *when* this suit was commenced. If he was not so entitled when he commenced the suit, facts *subsequently* occurring cannot be introduced, either by amendment nor by supplemental complaint, to make a title to recover—so that the taking of letters testamentary, by the defendant, does not give the plaintiff a right to recover in this action, if he had not that right before such letters were taken. If it was essential to the right of recovery that the representative of John Harrison should be before the court, the plaintiff should have waited until such a representative was appointed. And it would not be just to the defendant, who, in this view of the subject, has a perfect protection, to permit the plaintiff, *in effect*, to bring a new suit, after he had gone to trial and discovered that he cannot succeed, by allowing him to amend his proceedings—certainly not without requiring him to pay all the cost to the present time, and opening the entire defence.

It is urged that a complete determination of the controversy cannot be had without the presence of the executor of John Harrison. Why not? The judgment of this court will be entirely effectual to settle forever, and without any prejudice to the executor of John Harrison, or any other third person living, the question, whether this defendant, individually, owes the

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plaintiff anything, or not. A judgment against this defendant will prejudice no one but himself. A judgment in his favor will prejudice no person not a party to the suit, not duly represented herein by the plaintiff.

Is it said, that a judgment herein against the defendant, for moneys collected by him as agent, may not protect him against the claim of the executor of John Harrison? The answer is twofold:—*First.* This objection was to be raised, if at all, by the defendant himself; and if he have not set it up as a defence, he has waived it by the express provisions of the Code. And again: if he does not seek this protection, it is not the duty nor right of the plaintiff, in this stage of the controversy, to force it upon him against his will. Besides, if it be conceded that the defendant might, for his own protection, have required the representative of John Harrison to be made a party, and he be not now held to have waived that objection, then the plaintiff was premature in bringing his suit as above suggested, and ought not now to be placed *rectus in curia* at the defendant's expense.

Still further; this protection to the defendant is not what is meant by the case suggested, viz., "when a complete determination of the controversy cannot be had without the presence of other parties." That case is, I think, where there are persons not parties whose rights must be ascertained and settled, before the rights of the parties to the suit can be determined. Doubtless there are many other cases, in which a defendant may require other parties to be brought in, so that the judgment of the court in the action may protect him against the claims of such other parties: but this is his own privilege, and he may waive it.

If by the claim that a complete determination of the controversy cannot be had without the presence of the executor of John Harrison, is urged on the ground that this defendant, being such executor, is liable in the one capacity or the other, and so there is propriety in bringing in the whole question into one suit, it may properly be answered—

First. That to bring him in to charge him as executor, would

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be to charge him in a suit commenced before he was liable to be sued, *i. e.* to enable the plaintiff to recover on a cause of action which, when the suit was brought, had no existence.

Second. The plaintiff has already commenced a suit against him as executor; and that suit is now pending for the same cause of action, and there is no propriety in giving to the plaintiff the privilege of litigating the same matter here, while he is prosecuting such other suit. Nor can we, upon the *plaintiff's application*, consolidate the two suits. He has chosen his own course in this respect, and the estate of John Harrison ought not to be subjected to the double litigation.

The circumstance that the defendant is himself the executor of John Harrison, does not alter the case in these respects. His rights, in these separate characters, are distinct, and his relations to this plaintiff, as well as to those who are interested in the estate of his testator, are distinct, as much so as would be those of himself and the executor, if the executorship were vested in a third person. How far a complaint seeking to charge the defendant individually, and also as executor, can be sustained under § 167 of the Code, it is not perhaps necessary for me to say. But various decisions might be referred to, to show that the causes of action cannot be united.

So also as to the question whether, under any and what circumstances, the agent or attorney in fact of an executor can be made liable directly to the administrator *de bonis non*, for moneys collected for such executor in progress of his administration, and whether the moneys thus collected can in equity be identified and withdrawn from the estate of the deceased executor, and from the claims of his other creditors, if any there be, need not be passed upon here. If there are difficulties in the way of the plaintiff's recovery, resulting from the answer to such inquiries, they may show that the plaintiff has misconceived his remedy, but that is all.

It was intimated, on the argument, that it was only sought by the supplemental complaint, to make the executor "a formal party," and that no decree was sought against him as executor. The prayer, it is true, is, that the plaintiff may have

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judgment against the defendant individually for said amount, but adds also the prayer, "that this court may settle and determine, in the same proceeding and trial in this court, the whole controversy now subsisting between the plaintiff and defendant," and for other and further relief, &c. This prayer is comprehensive enough to amount to a consolidation of both suits, and to embrace any relief which the plaintiff, as against this defendant, in any capacity may claim. And I do not perceive either the necessity or propriety of calling in the executor as a "formal party." If the plaintiff had no cause of action when the suit was commenced, the adding of formal parties will not give him one. If his cause of action was perfect at that time, the absence of formal parties cannot prevent his recovery. It is not merely "formal parties" that the Code, § 122, requires the court to bring in. The absence of such parties is waived. If the presence of the executor is only required in order to conclude him in respect to the liability of the defendant to the estate of John Harrison for the same moneys, then, as above suggested, the plaintiff cannot force that protection upon the defendant in this stage of the controversy against his will, even if he might have been permitted to make such executor a defendant as a *proper party* in the first instance.

I cannot perceive any sufficient reason for granting the motion, unless it be founded in the idea that the plaintiff may not establish his claim against the defendant individually, and possibly may show that, as executor of John Harrison, the defendant is liable, and that therefore he ought to be saved the costs of this suit, by bringing in the whole controversy into one litigation, notwithstanding another suit is pending against the defendant in his representative character. Such a reason the plaintiff does not, and would not urge; and if he did, what I have above suggested seems to me to dispose of it.

I am constrained to conclude that the motion should be denied; but as it was, to some extent at least, made in reliance upon the recommendations of the referee, the defendant's costs of the motion, \$10, should abide the event of the suit.

Ordered accordingly.

Moffatt agt. Pratt.

SUPREME COURT.

EBER MOFFATT agt. ZADOCK PRATT.

What matters considered *irrelevant* and *redundant* in the statement in the complaint of the cause of action, for the possession and conversion of personal property.

(*The pleader, in this case, seems to have entertained enlarged views in reference to the description of the CAUSE OF ACTION, and to have exercised quite a liberal indulgence in applying consequences to the defendant.*)

Albany Special Term, July, 1855.

MOTION to strike out, &c.

The complaint stated that one Hiram Cumming was possessed of about 500 prints, struck from a certain steel-plate engraving, *originally designed to represent the form and features of the celebrated British statesman Sir Robert Peel, in a standing posture, and whose head was decapitated, or struck off, by a certain curious piece of mechanical necromancy, and the head of the defendant, the Honorable Zadock Pratt, substituted therefor, at his special instance and request, and under his dictation and direction,* with which he was so well pleased, that he contrived to get into his possession the said prints, which the said Hiram Cumming duly sold to the plaintiff for a good and sufficient consideration; and which, after such sale and transfer, and before the commencement of this action, the defendant wrongfully converted to his own use, *by distributing in divers counties and different sections of this state, to be stuck up in the pot-houses, bar-rooms, groceries, oyster saloons, public libraries and legislative halls, for the purpose of exhibition, so that the enlightened freemen of the empire state would become so enamored of his august personage as to bear him triumphantly into the executive chair, and make him governor of a mighty commonwealth,* the said prints still being the property of the plaintiff, and he being entitled to the possession thereof. Wherefore the plaintiff demands judgment against the defendant for \$500, the value of the prints.

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The defendant moved to strike out, as irrelevant and redundant, those parts of the complaint which are printed in *italics*.

THOMAS SMITH, *for plaintiff.*

W. H. PECKHAM, *for defendant.*

HARRIS, Justice. The subject of the action is certain prints, which the plaintiff alleges the defendant had wrongfully converted to his own use. It was proper that the plaintiff should describe the property thus converted. He has chosen to do so by referring to the origin and history of the engraving from which the prints had been struck. The description is sufficiently distinct and intelligible. It might, undoubtedly, have been stated more briefly, and, perhaps, in terms less offensive to the defendant, but this was a matter of *taste*, rather than of *legal necessity*.

So far as the matter of the complaint embraced in the motion tends to furnish a description of the subject of the action, it cannot be regarded as either irrelevant or redundant. But I think it was quite unnecessary for the plaintiff to state that the "mechanical necromancy," by which the head of Sir Robert Peel was *struck off*, and that of the defendant substituted, was performed "*at the special instance and request of the defendant, and under his dictation and direction.*" This part of the statement can hardly be considered as tending to identify the engraving from which the prints in question had been struck. It was obviously designed for an entirely different purpose—*one unknown to the rules of pleading under any system of practice.* This portion of the complaint, therefore, must be struck out, as wholly irrelevant.

And so must all that portion of the complaint specified in the *second* clause of the defendant's notice. It was enough for the plaintiff to allege that the prints had been wrongfully converted by the defendant to his own use. If the conversion should be denied by the defendant, it may, upon the trial, be allowable for the plaintiff to show that the defendant had distributed the prints in the manner stated, with a view to estab-

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lish the fact of a conversion. But even then, it would be quite incompetent for the plaintiff to give evidence, even if he were able to do so, to show the motive which actuated the defendant in making such distribution. Whatever may have been the defendant's purpose, if he has converted the plaintiff's property, he is liable for its value. He is liable for nothing more, even though he had been actuated by a motive as absurd and ridiculous as that stated in the complaint.

The defendant having but partially succeeded in his motion, neither party is entitled to costs.

SUPREME COURT.

THE PEOPLE *ex rel.* JAMES R. ALLABEN agt. THE BOARD OF SUPERVISORS of the County of Delaware.

A judgment of the supreme court, recovered in a contested action, against the overseers of the poor of a town, in their official characters, is conclusive evidence of the liability of their town to pay the demand on which the recovery was had; and the board of supervisors of the county have no right to go back of the judgment, and inquire whether the demand was a proper charge against the town. The fact that the judgment was rendered upon the report of a referee does not vary its effect.

The judgment being regular on its face, *estops* the board of supervisors from inquiring whether the town was originally liable to pay the demand upon which it was recovered.

Where a board of supervisors refused to levy and assess such a judgment upon the town represented by the overseers of the poor, on the ground that the town was not originally liable to pay the demand upon which the recovery was had; *held* erroneous, and a *mandamus* was granted to compel them to collect such judgment.

It was also held, that the judgment should be collected of the town represented by the overseers of the poor, although there was no distinction in the county between town and county poor.

The decision in this case does not necessarily conflict with that of *Gers agt. Supervisors of Cayuga County.* (7 How. Pr. R. 255.)

It being the duty of the board of supervisors to collect the judgment of the town,

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held, that a request by the relator to collect it of the town or county was sufficient, the board having refused to collect it of either the town or county.

Also held, where the statute required the board of supervisors to collect a judgment upon the presentation to them of a certified copy thereof, that the production to them of the original record was a substantial compliance with the statute.

Allegations in the return to an alternative *mandamus* not proved, which are denied by the relator in his pleas, are not to be taken as true on the trial of the issues formed by the pleadings.

A curious case, illustrating the uncertainty of the law, and the pursuit of legal remedies under difficulties.

If the overseers of the poor of a town who have sufficient moneys in their hands belonging to their town, not specially appropriated, refuse to pay a judgment rendered against them as such overseers, which is regular upon its face, they become personally liable to pay the amount of such judgment, with interest thereon.

No execution can issue upon such a judgment; but if it is not paid by the overseers of the poor, out of moneys in their hands belonging to their town, it should be assessed, levied and collected of such town by the board of supervisors of the county.

Delaware Circuit and Special Term, Jan., 1856.

THIS action was tried before Justice BALCOM, without a jury, at the Delaware circuit, in January, 1856, when the following facts were proved:—

The relator, on the 10th day of July, 1852, recovered a judgment in this court against Ira Whitcomb and Contine Connally, overseers of the poor of the town of Middletown, in Delaware county, for \$112.05 damages, and \$59.47 costs, on an account that the relator purchased of Jonathan C. Allaben, and which account was for services rendered by the latter as a physician at the request of one David C. Sliter, a former overseer of the poor of said town. The services were performed in attending upon and prescribing for several poor families when the small-pox prevailed in Middletown in 1846.

The judgment-roll was filed, and the judgment was docketed in the office of the clerk of the county on the day aforesaid. The action in which the judgment was recovered was tried before a referee. It was defended by attorneys retained and paid by the superintendents of the poor of the county. The superintendents appealed, in the name of the overseers, from the

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judgment to a general term of this court; which appeal was dismissed in January, 1853, by the request of the overseers, and against the wishes of the county superintendents. No stay of proceedings on the judgment was obtained, and no security for costs was given on the appeal.

While the appeal was pending, the relator presented the judgment-roll to the board of supervisors at their annual meeting in November, 1852, and the board postponed action thereon until their next meeting in December following, when the relator requested the board to audit and collect the amount of the judgment against the county, in the same manner as contingent expenses of the county are levied and collected, which the board refused to do. The board then passed a resolution waiving the presentation to them of a certified copy of the judgment-roll. After the appeal was dismissed, and in November, 1853, the relator again presented the judgment-roll to the supervisors at their annual meeting; and also again at their meeting in December of that year. The presentation of a certified copy of the roll was not required. At each of said times the relator asked the board to audit and levy the amount due on the judgment; first against the county, which was refused, and then against the town, which was also refused. The board, however, at one time passed a resolution to allow the relator \$125 on the judgment, if he would accept that sum in satisfaction of his claim, which sum he refused to accept, and it was not levied or collected.

The account on which the judgment was recovered was twice presented, before it was assigned to the plaintiff by Jonathan C. Allaben, to the county superintendents of the poor, for allowance or payment, and they refused to audit or pay it.

There was no distinction between town and county poor in Delaware county at the time the account was made, nor has there been any such distinction since that time. The supervisors refused to collect the judgment of either the town or county, on the ground that the overseers of the poor of Middletown were not liable, in their official capacity, to pay the account upon which the judgment was recovered; the board

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being of the opinion that the judgment was not conclusive upon them. And after investigating the account, they came to the conclusion that the judgment was erroneous and void, and that they ought not to audit it or collect it.

The relator obtained an alternative writ of mandamus, commanding the defendants (the board of supervisors of Delaware county) to properly assess, levy and collect the judgment, or show cause to this court why they had not done so. The defendants made their return to the writ. The relator pleaded thereto. Issues were joined thereon, which are now tried.

JAMES R. ALLABEN, *counsel in person.*

GORDON, MORE & PALMER, *for defendants.*

BALCOM, Justice. The point made by the defendants' counsel, that the board of supervisors could go back of the judgment; or, in other words, sit in review of a judgment of this court, recovered in a contested action, seemed to me, on the trial, as novel as the proposition once made by a member of the legislature, to amend the Code, so that appeals from the judgments of justices of the peace should be made to the town meetings in the several towns where the justices giving the judgments reside; and that the decisions of the town meetings should be final, and be ascertained by a *viva voce* vote of the electors. Subsequent reflection, and an examination of the statutes and authorities bearing upon the case, have not relieved my mind of this impression.

The judgment is entirely regular and valid on its face against the overseers of the poor of Middletown in their official characters; but I am asked to pronounce it void, as against the town or county; or, in other words, to hold that the court erred that gave it. And it is assumed that I should do this because the board of supervisors have reviewed it *ex parte*, or in the exercise of some undefined discretion, ascertained that the court or referee who tried the issues in the action, committed an error, in holding that the overseers of the poor of Middletown, as such, were liable to pay the demand for which the

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recovery was had. This I cannot do. It will better comport with sound principles to hold, that the only way to avoid an erroneous judgment of this court, recovered on a contested trial, is by an appeal, or by a motion to set it aside.

If the supervisors could go behind the record, and ascertain whether the demand was just or unjust, legal or illegal, reasonable or unreasonable, they could proceed *ex parte*, or act upon affidavits or hearsay evidence, and reject or admit such evidence as they pleased; and then refuse to allow the claim: and when called into court to answer for their conduct, they could say to the court, "You have given a wrong judgment, and we have, therefore, disregarded it. Now acknowledge your errors, and award us costs for the information we have given you." Although boards of supervisors are composed of very intelligent men, the absurdity of such a proposition must be apparent to the most zealous reformer.

The fact that the judgment was entered upon the report of a referee, does not alter the case, or vary its effect. "The report of the referee upon the whole issue stands *as the decision of the court*, and judgment may be entered thereon in the same manner as if the action had been tried by the court." (*Code*, § 272.)

It is unnecessary, in determining this action, to hold, that a judgment rendered upon *confession*, against an overseer of the poor in his official capacity, concludes the supervisors, so they cannot inquire whether the whole or any part of the account on which the confession was made was a county charge. (*Gere agt. Supervisors of Cayuga County*, 7 How. Pr. R. 255.)

The relator's request to the board of supervisors, to audit his judgment against the town *or* county, was sufficient. The board should have ascertained whether it was a proper charge against the town or county, and then assessed it against whichever was liable to pay it.

The relator should have presented to the board "a certified copy of the docket of his judgment, or the record thereof, if required by the board." (2 R. S. 475, § 102.) He presented the original judgment-roll, without any copy of the docket.

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The original roll was higher evidence than a certified copy; and its production, instead of a copy, was a substantial and sufficient compliance with the statute. (*Ex parte Newell, receiver, &c.*, 4 *Hill*, 608.) A certified copy of the docket of the judgment was not called for; and a presentation of a certified copy of the roll was expressly waived by the board; and it does not appear that the board refused to levy and collect the judgment because no certified copy of the docket was presented to them. They placed their refusal on other grounds. The defendants should therefore be precluded from now insisting that the relator should have presented to them a certified copy of the docket of his judgment.

If the defendants' positions are correct, the relator's judgment is a nullity. The statute forbids the issuing of execution upon such judgment. (2 R. S. 476, § 107; 19 *Wend.* 50; 11 *id.* 181; 4 *Hill*, 138.)

If the supervisors cannot be compelled to assess it upon the town represented by the overseers of the poor, it must remain uncollected; for the overseers of the poor cannot be made personally liable to pay it *by their simple refusal to pay*, because they only render themselves personally liable when they refuse to pay moneys in their hands, not specially appropriated, upon judgments recovered, "on account of the liability of their town." (2 R. S. 474, 475, §§ 102, 105.) And it is conceded, if this judgment was recovered "on account of the liability of the town," that the supervisors can be compelled to collect it. It must also be admitted, if the former overseer of the poor of Middletown was liable, in his official capacity, to pay the account upon which the judgment was recovered, then his successors in office were properly sued for the debt. (2 R. S. 473-475, §§ 92-99; see 7 *Wend.* 181; 4 *Hill*, 168; 11 *Wend.* 181.)

The overseers of the poor are agents of their town, and a judgment recovered against them, as such overseers, binds their town, within principles that may be found in the following cases:—*Calkins agt. Allerton*, 3 *Barb. R.* 171; *Gelston et al. agt. Hoyt*, 13 *Johns. R.* 561; 1 *Duer*, 79; 6 *Barb.* 515; 18 *Johns. R.* 352; 5 *Denio*, 299; 5 *Esp. N. P. Cases*, 56; 1 *Paige*,

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41; 5 *Denio*, 497; 2 *Doug.* 499; 4 *Tenn. R.* 590; 24 *Wend.* 35, 53.) And it follows, of course, that a judgment binding upon the town cannot be questioned by the board of supervisors, when they are called upon to enforce it according to the statute.

The judgment being conclusive evidence that the recovery was had against the overseers of the poor of Middletown, for a debt contracted on account of the liability of such town, the supervisors, upon the production to them of the record of the judgment, should have assessed, levied and collected the amount of such judgment, with interest thereon to the first Monday in February then next, against the town of Middletown. (2 *R. S.* 474, 475, § 102-107; *Avery & Lathrop* agt. *Slack*, 19 *Wendell*, 50; *The Supervisors of Galway* agt. *Stimson*, 4 *Hill*, 188.)

The statutes above cited show that the supervisors had no discretion in the premises; nor had the overseers of the poor against whom the judgment was rendered, any right to refuse to pay it, provided they had sufficient moneys in their hands belonging to their town, not specially appropriated; and a failure to do so, if they had such moneys, made them personally responsible to the relator for the amount of such judgment and interest thereon. (2 *R. S.* 475, §§ 104, 105; 4 *Hill*, 138.)

The defendants' counsel have insisted that I should refuse to grant a peremptory *mandamus*, on the ground that the published decisions of this court, as they claim, show the judgment in question to be erroneous; and the cases of *Vedder* agt. *The Superintendents of the Poor of the County of Schenectady*, 5 *Denio*, 564; *Holmes and others, overseers*, agt. *Brown, overseer*, 13 *Barb. R.* 599, and *Green* agt. *Brown*, 4 *Hill*, 558, have been cited to establish such proposition. A short but sufficient answer to all this is, I am not reviewing the judgment as an appellate court, but am only considering it when it collaterally comes in question.

As an off-set to this proposition, I will remark, that an opinion has been furnished me, showing that the first litigation over the account forming the basis of the judgment in controversy, was in an action brought in a justice's court, by the relator against Sliter personally, who was the overseer of the poor of

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Middletown when the account was made. The justice gave judgment against Sliter on the account. The county court of Delaware county reversed the judgment, on the ground that Sliter was not *personally* liable; holding that the debt was contracted in his official character, and that the town, or his successor in office, was liable to pay it; and this court, at a general term thereof, affirmed the judgment of the county court. If the relator could now be beaten in this action, he might well complain of the uncertainty of the law. And such a boxing of the judicial compass, in search of justice, without success, would be a reproach to the law, or those who administer it.

Another point made by the defendants' counsel is, that the return to the alternative mandamus shows that the relator *knew* this court would reverse his judgment, if it should be brought to a hearing at a general term, on the appeal made by the county superintendents of the poor; and that, knowing such fact, and by fraudulently suppressing the same from the knowledge of the overseers of the poor of the town, and by other fraudulent conduct, he induced them to consent to a dismissal of such appeal. These allegations of fraud are denied by the relator in his pleas; but the position taken is, that the relator must not only deny such allegations, but must also *prove* them untrue; or the court, under the statute, (2 R. S. 586, § 55,) must regard the same as true, and decide accordingly. I will say nothing about the improbability of the relator knowing what the court *would* decide, for it seems to me the point is clearly untenable.

It is proper to add, although there is no distinction as to the support of the town and county poor in Delaware county, the judgment in question must be collected of the town, against the officers of which the same was recovered. (2 R. S. 475, § 103.)

The conclusions before mentioned determine the whole case. It therefore becomes unnecessary to examine any other points made by the defendants' counsel.

I find for the relator on all the issues in the case; and judgment in his favor is ordered against the defendants for costs; and a peremptory mandamus is granted to the relator, com-

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manding the defendants to assess, levy and collect the amount of the judgment aforesaid, with interest thereon from the day it was docketed until the first Monday in February, 1857, (unless it shall be sooner paid,) against the town of Middletown, as other contingent charges against such town are assessed, levied and collected.

—————

NEW-YORK COMMON PLEAS.

EDGERTON agt. PAGE.

It is well-settled law, in this state, that there must be an *entry* and *expulsion* of the tenant by the landlord, or some *deliberate disturbance* of the possession, depriving him of the beneficial enjoyment of the demised premises, to operate as a *suspension* or *extinguishment* of the *rent*.

That a tenant has power to prevent, or can prevent the disturbance of his possession, does not, in the absence of any obligation to do so, destroy the legal effect of an *eviction*.

It is the duty of a landlord, who creates a *nuisance* or *disturbance*, to the tenant, to abate the one, or arrest or remove the other.

Where the landlord occupied the upper part of the premises, and his tenant the lower part; and it appeared that, for a period of three months previous to the 1st May, 1855, the landlord, with a full knowledge that the waste water-pipes on his portion of the premises were out of order, and by their use waste water and other filth flowed through them, and leaked down upon the tenant, injuring his property, and depriving him in a great measure of the beneficial enjoyment of his premises; and after repeated requests from the tenant to repair the pipes or desist from using them—*held*, that these facts were sufficient to sustain the defence of *eviction*.

The tenant was not obliged to *abandon* the premises, to make the interruption of his possession available as a defence. Such interruption continued during the whole of the quarter, and *suspended* the rent while it continued.

Special Term, Jan., 1856.

THIS action was commenced to recover one quarter's rent of the first floor of the premises, No. 8 Fulton-street, ending 1st of May, 1855, under a hiring for one year from 1st May, 1854,

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with the privilege of one year more. The answer sets out the agreement of renting, and alleges—

That the renewal provided for in the lease was the main inducement to the taking of the lease, and principal cause of its value.

That between 1st day of February, 1855, and 1st May, 1855, the plaintiff was the occupant of the entire upper part of the premises in question, and also of premises No. 10 Fulton-street.

That between those days the plaintiff negligently and wantonly suffered a waste-pipe, or pipes which were used to carry off waste water from the upper part of premises No. 8 and No. 10 Fulton-street, and attached thereto, and which extended down along the rear of those premises and communicated with the sewer, to get out of order and become unfit for the purpose for which they were intended. And further, that in consequence thereof, waste water and other filth flowed through the pipes, and leaked and escaped therefrom into and upon the ceiling, floor and other parts of the demised premises, interfering with, and depriving the defendant in a great degree of the substantial and beneficial enjoyment of the premises, and injuring and destroying the property of the defendant.

That the plaintiff knew of the condition of the pipes, and the injury to the defendant, as stated, and could have prevented it by ordinary care and vigilance on his part.

That, although requested at divers times, commencing with the 1st of February, 1855, and ending with the 1st of May, 1855, to repair the waste pipes, or abstain from the use of them, he did neither.

That, in consequence of these occurrences, the defendant was obliged to abandon the demised premises, and was deprived of the privilege to renew his term, of which he intended to have availed himself.

That the plaintiff and his servants negligently and wantonly poured and threw water, filthy and otherwise, at divers times during the period last mentioned, from the premises occupied

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by him, so that the same ran into and upon the premises of the defendant, and injured his property.

That, under the circumstances, the defendant denies that he occupied the demised premises, or is indebted for rent, as alleged in the complaint, or that the plaintiff is entitled to any judgment against him.

The defendant then insists that these matters amount, in law, to an eviction, and are a bar to the plaintiff's recovery. But, if not allowed as such, alleges that he will recoup the damages sustained, or claim the benefit thereof, in some way to be held by the court.

The plaintiff demurs to the answer on several grounds stated in detail, but to the defence of eviction for the following reasons :—

First. That the facts do not constitute an eviction.

Secondly. That the interference or disturbance is not tantamount to an eviction *before the tenant leaves the premises*. He cannot be evicted and still occupy ; and,

Thirdly. Because the defendant did not leave the demised premises until after the expiration of the term, and until the rent had fallen due by the terms of the contract.

BRITTON & ELY, *for plaintiff.*

JOHN GRAHAM, *for defendant.*

BRADY, Judge. It was conceded on the argument that by the well-settled law of this state, there must be an entry and expulsion of the tenant by the landlord, or some deliberate disturbance of the possession, depriving him of the beneficial enjoyment of the demised premises, to operate as a suspension or extinguishment of the rent. (*Dyett agt. Pendleton*, 8 Cow. 727; *Ogilvie agt. Hill*, 5 Hill, 52; *Cohen agt. Dupont*, 1 Sand. S. C. R. 260.) And Chief Justice NELSON, in *Ogilvie agt. Hill*, *supra*, says that, "No general principle is better settled, or more uniformly adhered to."

It was insisted, however, by the counsel for the plaintiff, that even if the facts were held sufficient to create an eviction, yet,

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as the defendant did not abandon the premises before the rent became due, the eviction was not complete. That this and kindred cases involved an election by the tenant, to be signified by quitting the premises, and that he could not be evicted and still occupy, as the defendant in this case had done.

I think it would be difficult to present a stronger case than that of the defendant. For a period of three months, with full knowledge of the condition of the pipes, and of the injury to the defendant's property, and although often requested to abate the wrong, the plaintiff permitted the water to flow on, utterly regardless of his duty as a landlord, and of the rights of his tenant. The pipes were used for his benefit, and the injury and disturbance which their condition caused and created could have been obviated, either by repairing them or abstaining from their use.

In the case of *Cohen agt. Dupont, supra*, the tenant was subjected to petty annoyances by the landlord and his family, not directly affecting the *apartments* of the tenant, but the access thereto, and the enjoyment thereof. The principal facts, however, were, that the tenant, being a dentist, had numerous calls upon him for professional aid; and that the plaintiff's family, by muffling the bell, compelled the visitors of the tenant to remain at the door from fifteen to twenty minutes without effecting an entrance. And it was insisted, that this, if persisted in, would seriously impair, if not destroy, the tenant's business. The plaintiff did not regard the remonstrances of the tenant against these acts, and the jury decided that the acts complained of were an eviction. The court concurred in that conclusion, and it was certainly correct.

It will be perceived that the acts charged upon the landlord, in that case, affected the enjoyment of the premises remotely, the only disturbance being in the access thereto, and not within them, involving no loss of property, but a probable injury if continued. In this case, the disturbance goes to the entire demise, and is attended by the destruction, not of the business-profits, but the property of the defendant.

It was urged, on the argument, that it was reasonable to as-

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sume, from all the facts divulged, that the pipes were used in common between the parties; and that, there being no covenant to repair on the part of the plaintiff, it was the duty of the tenant to protect himself. No precedent, it is believed, can be found for assuming any fact by inference or implication, to sustain a demurrer, more especially if that assumption would conflict with the facts admitted by the demurrer itself. In addition to that, however, and as a further answer, the disturbance is alleged to have resulted from pipes used by the plaintiff on his part of the premises, over which he had control, but which control he neglected to exercise. The defendant had not covenanted to repair; and if he had, his covenant would extend only to his demise, of which the pipes formed no part.

That a tenant has power to prevent, or can prevent, the disturbance of his possession, does not, in the absence of any obligation to do so, destroy the legal effect of an eviction. The doctrine of self-protection in that respect, as it may be styled, was announced by Justice SUTHERLAND, in *Dyett agt. Pendleton*, (4 Cow. 581,) but the court of errors, when that case was decided there, rejected the doctrine, and, as I understand it, for the plain and obvious reason, that it is the duty of a landlord, who creates a nuisance or disturbance, to abate the one or arrest or remove the other.

Having thus determined that the facts alleged in the answer are sufficient to sustain the defence of eviction, it is only necessary to consider the effect of the defendant's continuing in possession until the rent became due.

Prior to the decision in the case of *Dyett agt. Pendleton*, an entry by the landlord, and expulsion of the tenant, was considered necessary to constitute an eviction; and the case of *Bennett agt. Bittle and another*, (4 Rawle, 389,) is regarded as a leading authority on that subject. I do not understand that case, although decided subsequently to *Dyett agt. Pendleton*, as recognizing the doctrine of eviction by the disturbance of the tenant in his possession. However that may be, the effect of an eviction by entry and expulsion, and of a constructive eviction, occasioned by the disturbance of the possession of the

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tenant, required by the rule, are different. In the former the rent is extinguished absolutely at once, and in the latter it is suspended only during the continuance of such disturbance, unless the tenant abandons the premises therefor. It is true, that the eviction, in either case, must take place before the rent becomes due. (*Whitney* agt. *M'Keon*, 3 *Denio*, 452.) But when it results from disturbance, as long as that disturbance continues the rent is *suspended*, and not extinguished, unless continued over a whole period for which rent would accrue under the lease, or unless the tenant abandon as above stated. The defendant was not, therefore, obliged to abandon the premises, to make the interruption of his possession available as a defence. Such interruption continued during the whole of the quarter, and suspended the rent while it continued.

I deem it unnecessary to discuss the other questions presented upon the right of the defendant to recoup, or in any way interpose his damages in this action, resulting from the acts complained of, regarding those acts as trespasses merely; although I have little doubt that the rule applicable is stated by Judge WOODRUFF in *Levy* agt. *Bond*, (1st *Smith, C. P. Rep.* 178,) and in *Drake* agt. *Cockcroft*, (10 *How. Pr. Rep.* 382.)

As the defence, however, is one which should be passed upon by trial, the judgment will be for the defendant, with liberty to the plaintiff to withdraw the demurrer, and to reply, if necessary, within twenty days, on payment of the cost of the issue of law.

Tibballs & Tibballs agt. Selfridge & Selfridge.

SUPREME COURT.

OSCAR TIBBALLS and WILLIAM H. TIBBALLS agt. DELIA SELFRIDGE and JOHN SELFRIDGE.

The *verification* of a complaint should follow the language of the Code (§ 157) in the essential form there given ; and not take special pains to state something a little different as an equivalent.

Where the party says, " that he knows the contents of the foregoing complaint, and that the same is true, except," &c., it is insufficient. He should state that the same is true *to the knowledge* of the party, except, &c. (*This agrees with Williams agt. Riel & Granger, 11 How. Pr. R. 374.*)

Columbia Special Term, Jan., 1856.

MOTION to strike out answer of defendant, Delia Selfridge, because not verified.

Defendant claims—

1. That verification of the complaint is not regular ; and answer need not be verified.
2. That a motion to *strike out* an answer could not be entertained for such a cause ; as the plaintiff's remedy (if his verification were sufficient) was to *disregard* the answer, return it, and enter judgment.
3. If the motion be otherwise proper, it is *too late* ; if should have been made the *first term* that it could be, *December Special Term.*

The *form* of the verification of the complaint is—

" A. B. being duly sworn says, that he is the attorney of plaintiffs in this action ; that he knows the contents of the foregoing complaint, and that the same is true, except as to matters stated on information and belief, and as to those matters he believes it to be true ; that the grounds of deponent's knowledge are the admissions of defendant, Delia, to him, as also from other persons ; and that the reason why plaintiffs do not verify this complaint is, that they are absent from this county."

Tibballs & Tibballs agt. Selfridge & Selfridge.

HENRY HOGEBOOM, *for motion.*
JOHN GAUL, JR., *opposed.*

GOULD, Justice. In this case there is found full illustration of having a *settled rule* of action, even in matters of mere form. The 157th section of the Code says, a pleading must be verified, as "true to *the knowledge* of the person making it, except," &c. And decisions are produced as to verifications shunning (as if purposely) the *simple, direct* words of this section, in a variety of ways; from merely omitting the words, "to the knowledge," to evasive and half evasive paraphrases of them. I can see no good reason why the courts should not require a compliance with the section, so full as to need no explanation; or why, if a party *means* to say what the law requires, he should not *say it*. If the verification means that it is true, *to his own knowledge*, let it *say so*; and let the courts, in all cases, *insist on that form*, and not its equivalent.

In this case it is urged, that subsequently stating "the grounds of deponent's knowledge," shows what he *must* have meant, and supplies any deficiency in the prior language. *Certainty* will never be attained in this way; and in a matter that it is *so perfectly easy to make exactly right*, there is no hardship imposed on any one in compelling him to make it so. I must hold the verification of the complaint, on this ground, bad.

As to the second point, it is, undoubtedly, correct practice, where the complaint is verified, and the answer is not, for plaintiff to disregard the answer, and enter his judgment. But in so doing he takes the risk of the correctness of his verification. And where the practice is, to any considerable degree, *unsettled*, he may fairly call on the court, in the way of a motion, to decide the point for him. And the practice is so far under the control of the court, that the want of a verification (when required) may be treated as a *badge of falsity*. And I would not, for *this reason*, refuse the motion.

As to the *delay* in making this motion, I am not aware that any such unyielding strictness, as to moving at the *first possible*

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ble term, has been adopted in such cases. The delay is, in this case, not unreasonable ; and it is difficult for me to see how it *prejudices the defendant*.

On the whole, I consider the ground first stated above, as the only one on which I should deny the motion. And, on that ground, it is denied. But there has been such indefiniteness in the practice on this point, that a party (though ultimately decided to be wrong) may fairly be allowed to come into court to have it *settled*. And I allow no costs of opposing the motion.

NEW-YORK COMMON PLEAS.

AUGUSTUS JENKINS agt. THE CONTINENTAL INSURANCE COMPANY.

It is well settled that a junior incumbrancer is entitled to redeem a prior mortgage. And the redeeming party, who is not himself liable as a principal debtor, but who is compelled to redeem for the protection of his own lien upon the mortgaged premises, is entitled to *subrogation* to the rights of the *senior mortgagee*.

But the right of the redeeming party to subrogation does not necessarily follow from the right of redemption. That right depends upon the relation of the parties liable to be foreclosed, to each other, and upon the circumstances in which the right of redemption is sought to be exercised.

A junior mortgagee, who holds a mortgage given to secure a sum of money not yet due, or payable, who alleges nothing in his bill showing that it is in any manner necessary for his protection, or the preservation of the security he holds, cannot insist upon his right to pay off the first mortgage, and claim subrogation to the position of the first mortgagee, and compel the latter to assign to him the first bond and mortgage.

Subrogation in equity proceeds upon the ground that it is *necessary* to the *protection* of the party ; and this will be true when, "in order to make his own claim beneficial, or available," it is necessary "to disengage the property from the previous incumbrance."

When the second mortgage *becomes payable*, the holder comes with a full right to require that the property be applied to the payment of the sum due to him ; and this cannot be done without "disengaging it from previous incumbrances."

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And where the holder of the first mortgage demands his money, or is proceeding to foreclose, then the second mortgagor may rightfully insist upon redeeming, and upon being subrogated to the rights of the first mortgagee.

If the claim to redemption comes from one who has received an absolute conveyance of the equity of redemption, the right to redeem is absolute and unqualified.

Special Term, Dec., 1855.

DEMURRER to complaint for subrogation and redemption of mortgaged premises.

JAMES HUMPHREY, *for defendants.*

AUGUSTUS F. SMITH, *for plaintiff.*

WOODRUFF, Judge. The general proposition, that a junior incumbrancer is entitled to redeem a prior mortgage, is, I apprehend, too well settled to be now opened for discussion. Such is the language of the elementary treatises, and the right is recognized in numerous adjudged cases. (*Fell* agt. *Brown*, 2 *Bro. C. C.* 278; *Stonehemer* agt. *Thompson*, 2 *Atk.* 440; *Knight* agt. *Knight*, 3 *P. Williams* 331, 4 *Kent's Com.* 162; *Story's Eq. Jur.* § 1,023; *Burnet* agt. *Denniston et al.*, 5 *Johns. ch.* 35; *Pardee* agt. *Van Auken*, 3 *Barb.* 535; *Averill* agt. *Taylor*, 4 *Selden*, 44; *Roosevelt* agt. *The President, &c., of the Bank of Niagara and others, Hopk. Ch. R.* 579, (*same case on appeal*, 4 *Com.* 409,).)

And the same authorities appear to me to establish that the redeeming party, who is not himself liable as a principal debtor, but who is compelled to redeem for the protection of his own lien upon the mortgaged premises, is entitled to subrogation to the rights of the senior mortgagee. The right of the senior mortgagee to require payment of the mortgage debt, and, upon default, to file his bill and obtain a decree extinguishing the equity of redemption and foreclosing all who have an interest in the mortgaged premises, carries with it and implies a right in each one who is liable to be thus foreclosed, or rather, in those who are entitled to the estate of the mortgagor in the land, or who have a legal or equitable interest therein, to pay the mortgage debt in discharge of such senior mortgage.

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To this extent the right of foreclosure and the right of redemption are correlative.

But the right of the redeeming party to subrogation does not necessarily follow from the right of redemption, although the language used by some would seem to warrant that inference. That right depends upon the relation of the parties liable to be foreclosed, to each other, the particular situation of the party claiming such right, and especially and generally upon the inquiry whether such subrogation is necessary for the protection of the rights of the redeeming party, and the preservation of his interest, and therefore upon the circumstances in which the right of redemption is sought to be exercised. Thus, when there are several successive mortgages upon the same premises, the mortgagor may have a decree for the redemption of the first mortgage; but he, by payment under such a decree, acquires no right to subrogation. He pays his debt, and the first mortgage becomes thereby satisfied. So the grantee of the mortgagor, holding the fee subject to the mortgages, may redeem the first mortgage, but he does not thereby become entitled to subrogation.

This illustration bears upon the present case no further than to show that the right to redeem does not necessarily include the right to subrogation to the condition of the first mortgage.

In the present case, the defendants hold a mortgage which, according to its terms, is payable.

The plaintiff holds a mortgage given to secure a sum of money which will not become payable until the year 1858, and the question raised by the demurrer herein is, whether the plaintiff, to whom nothing is yet payable, who alleges nothing in his bill showing that it is in any manner necessary for his protection, or the preservation of the security he holds, can not only insist upon his right to pay off the first mortgage, but may also claim subrogation to the position of the first mortgagee, and compel the latter to assign to him the first bond and mortgage?

And this inquiry involves a consideration of the ground upon which the right of subrogation in equity proceeds—which, ac-

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cording to my view of the subject, is, that such subrogation is necessary to his protection, and this will be true when, "in order to make his own claim beneficial or available," it is necessary "to disengage the property from the previous incumbrance."

No such necessity, nor any reason whatever, is stated in the complaint herein for seeking to redeem the first mortgage—for aught that appears in the complaint, the mortgagor pays the interest accruing on the first mortgage promptly, and pays the interest accruing to the plaintiff as it becomes due, and is simply availing himself of the indulgence of the first mortgagee, and taking the credit which the terms of the plaintiff's mortgage give him. The first mortgagee does not call for the money, and does not wish to receive it.

The plaintiff appears to me to come as a mere volunteer, (to whom nothing is due—towards whom, for aught that appears, the mortgagor will perform every duty in due season for his protection,) to interfere between the first mortgagee and the debtor to compel the latter to pay the debt or submit to be foreclosed.

That there are circumstances in which such second mortgagee may not only redeem but may require such a subrogation cannot be denied, and when (as formerly) a mortgagee was entitled to the actual possession of the mortgaged premises, and to the receipt of the rents and profits in payment of the mortgage debt, such right is no doubt general.

In this last case, his title to the possession, and the rents and profits, cannot be exercised unless the prior incumbrance is removed.

But in this state no mortgagee can, by statute, maintain ejectment.

His only proceeding to reach the premises is by foreclosure; and so long as no sum, either of interest or principal, is due to him, the prior incumbrance deprives him of no interest in, or enjoyment of, the lands mortgaged. He holds his mortgage as a mere security for the future payment of moneys not yet due, and which, for aught that appears, and can be made to appear,

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will be paid to him by the mortgagor when the day of payment arrives.

If the first mortgagee required that his debt shuld be paid—or was proceeding to foreclose ; or if he or the mortgagor, or both, were doing anything whatever, or were about to do anything which could operate to make the second mortgage any less secure or available than it was at the moment the holder of the latter received it as a security, he might, with propriety and equity, call upon the court, not only to suffer him to redeem, but to compel an assignment of such first mortgage to him for his protection. I believe that in every case to which I have been referred by counsel, and all that I have examined, one of two reasons for claiming redemption and subrogation existed—either the second mortgage debt, or the debt secured by the subordinate lien, when redemption was sought by a lien-holder by judgment (or otherwise) was actually due and payable, or the holder of the first mortgage was about to foreclose, or do some act which operated to impair the security of the claimant.

When the second mortgage becomes payable, the holder comes with a full right to require that the property be applied to the payment of the sum due to himself; and this cannot be done without “disehaging it from previous incumbrances;” and, on the other hand, the holder of the first mortgage demands his money, or is proceeding to foreclose, then the second mortgagee may rightfully insist upon redeeming, and upon being subrogated to the rights of the first mortgagee. If the claim to redemption comes from one who has received an absolute conveyance of the equity of redemption, the right to redeem is of course absolute and unqualified. But the second mortgagee in this case has only a conditional conveyance of that equity. He holds it merely as security, and unless he can show some reason why it is necessary for the preservation of his security that he should redeem, I perceive no sufficient reason for the interposition of the court to enable him to obtain the possession and control of the first mortgage debt. He has already all that he bargained for, and, so far as appears from the present

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complaint, all to which he is equitably entitled. The purpose or motive prompting him to seek the redemption, is not disclosed by the present complaint; he rests on the naked fact that he holds a second mortgage not yet payable. If the court may consider what, from the description of the mortgaged premises given in the complaint, seems probable, viz., that the premises consist of a single lot of ground, with the building thereon, incapable of a sale in parcels, the plaintiff seeks, by obtaining the control of the first mortgage, to place himself in a position in which he may practically compel the payment of his own mortgage debt, although it will not be payable until 1858; for obviously if he foreclose the first mortgage, and the premises cannot be sold in parcels, he will, so far as the premises are sufficient, be able to collect both debts, unless the mortgagor is prepared to pay off the first mortgage.

So far as the condition of a second mortgage may be likened to that of a surety for the payment of the first mortgage, (and I am aware it has to some extent been so regarded,) so far he is entitled to be treated with favor in a court of equity; and I am free to say, that slight grounds to apprehend loss would be sufficient to warrant his prayer for the relief sought in this case; and if it appeared that the property was depreciating in value, or that it was not kept in repair, or that he had received his mortgage without actual knowledge of the existence of the first mortgage, or upon an express agreement, or even a plain duty on the part of the mortgagor to pay off the first incumbrance, when it became due, so as to render the second mortgage available for any ulterior purposes had in view at the time of its delivery, I think the court should, in either of these cases, as well as in the others before mentioned, grant him such relief. But, upon the merely naked statement that he holds a mortgage on the equity of redemption, conditioned for a future payment not yet due, it appears to me that he makes no case calling for the interference of a court of equity. He has no absolute interest in the equity of redemption, the mortgage being, under our laws, a mere security; he does not hold the whole interest of the mortgagor. The equity of redemption is pledged to him,

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it is true, but with a condition hitherto fully performed, (so far as appears by the complaint,) and which may be fully performed in the future. He shows no reason why the court should interfere in his relief for any purpose. It will be in season to invoke such interposition when his mortgagor makes some default in the performance of the condition, or when the first mortgagee calls for payment, or when some fact can be alleged, showing that his own security is in peril, or that the mortgagor is suffering either the property to depreciate or the first mortgage debt to accumulate, or that the security is inadequate, or that the mortgagor is in the receipt of the rents and profits, without applying them towards the reduction of the first mortgage, or that some other reason exists for interference to save him from loss.

It is quite possible that special circumstances exist, in the present case, which, if alleged, would make the plaintiff's case quite clear; and, on the other hand, it may prove to be a contest between two mortgage creditors, as to who shall have the benefit of a safe investment on bond and mortgage which the mortgagor has no desire to pay off. If the latter be the truth, it is obvious that the mortgagor, by giving to the defendants another mortgage, even for one hundred dollars, on a credit of ten or twenty years, would place them in as good a position (even if the plaintiff was to have a decree herein) to claim, in their turn, a redemption of the first mortgage, as the plaintiff is now in.

The considerations I have mentioned, very naturally, I think, suggest the inquiry, whether, in any view of the case, a decree could be made for the plaintiff without having the mortgagor before the court, and also the present owner of the fee. The demurrer raises no such objection to the plaintiff's complaint; but inquiry may be useful if the plaintiff should think proper to amend his complaint in other respects, and deem it prudent to bring in other parties. (*See Fell agt. Brown, 2 Born. C. C. 278, and 3 P. Williams, 331; Stonehemer agt. Thompson, 2 Atk. 440.*)

My conclusion is, that the demurrer should be sustained, with leave to the plaintiff to amend on the usual terms.

Evans & Newton agt. Burbank.

SUPREME COURT.

WALTER EVANS & CYRUS NEWTON, appellants, agt. WILLARD BURBANK, respondent.

When the *adverse party* is offered as a witness, under § 399 of the Code, his testimony must be confined to the subject-matter upon which the assignor may have been examined; and is required to be responsive, or at least relative to that examination. (*This agrees with Potter agt. Bushnell, 10 How. Pr. R. 96; and Carpenter agt. Secor, 11 id. 403.*)

Eighth District, Erie General Term, Jan., 1856.

BOWEN, P. J., MULLETT and GREENE, Justices.

THIS is an appeal from a judgment of the county court of Allegany county, reversing a judgment of a court of a justice of the peace, on appeal by the defendant in the justice's court.

The action before the justice was brought against Burbank to recover damages on account of his failing to build a steam saw-mill, in a proper manner, according to his agreement with one William M. Truman, and which had been assigned to the plaintiffs.

The defendant, by his answer, denied every allegation in the complaint; and further set up a performance on his part. Upon the commencement of the trial, the plaintiffs called the said William M. Truman, the assignor of the contract to them, as a witness on their behalf, who testified that he made the agreement with the defendant, to build a steam saw-mill—said mill to be built according to Snell's plan for putting up the steam apparatus. That the mill was completed the 11th day of June, 1851. That some time in September thereafter, he, the witness, sold all his right and title to the mill to Cyrus Newton, one of the plaintiffs; and all his claim for damages against the defendant, in consequence of the mill not running well, to these plaintiffs.

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Afterwards, in the course of the trial, Willard Burbank, the defendant, was sworn in his own behalf, and after stating that he made the contract with Truman for the building of the mill, was proceeding to state that he went on and built what he called a good mill, and that he built it according to the irons, when the counsel for the plaintiffs objected to the testimony, on the ground that Truman, the assignor, had not been examined as to those matters. The counsel for the defendant then offered to prove by him, "*that the work was well done, and that the mill was a good mill, and run well in all respects.*" This evidence, on the motion of the plaintiffs, was excluded by the justice, who, after receiving some further testimony on other facts, rendered a judgment for the plaintiffs for \$50 damages, and \$5 costs, amounting in the whole to \$55.

ANGEL & STANTON, *for appellants*
GROVER & SIMONS, *for respondent.*

By the court—MULLETT, Justice. The only error in the proceedings before the justice, complained of in the county court, was his rejection of the evidence offered to be given by Willard Burbank, the defendant, in his own behalf.

This was an action to recover damages of Burbank, for improperly performing a contract to build a steam saw-mill. The contract was made between Burbank and one William M. Truman, and had been assigned by Truman to the plaintiffs. Truman, the plaintiffs' assignor, had been examined as a witness in their behalf, and had testified, in substance, that he made a contract with Burbank, the defendant, for building the mill. That the mill was to be built according to Snell's plan for putting in the steam apparatus; that the defendant was to make a good mill; that the mill was completed the 11th day of June, 1851; that some time in September thereafter, he, the witness, sold his right and title to the mill to Cyrus Newton, one of the plaintiffs; and all his claim against the defendant for damages in consequence of the mill not running well, to the plaintiffs jointly. Thereupon Burbank, the defendant, offered himself

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as a witness in his own behalf, and proposed to testify that the mill was a good mill, that the work was well done, and that the mill was a good mill, and run well in all respects. The justice rejected the offered evidence, and this constitutes the error complained of.

The second clause of § 399, of the Code of 1851, provides that, "When an assignor of a thing in action, or contract, is examined as a witness on behalf of any person deriving title through or from him, the adverse party may offer himself as a witness, to the *same matter*, in his own behalf, and shall be so received."

The design of this section of the Code, is to subject the testimony of an assignor of a thing in action or contract, when it is resorted to on behalf of a person deriving title through or from him, to the contradictions, explanations, or qualifications of the other party to the contract, and not to allow it in cases where it cannot be so met, contradicted, explained or qualified. Thus, if the other party to the contract be the adverse party in the action, he may offer himself as a witness, to the same matter, in his own behalf; and this secures to him the desired mutuality of rights with the other party to the contract. But the assignor shall not be examined in behalf of any person deriving title through or from him, against an *assignee*, *executor*, or *administrator*, who of course was not a party to the original contract, unless the other party to the contract, or thing in action, is living, and his testimony can be procured for such examination, or, in other words, unless such mutuality can be obtained.

In the case under consideration, Burbank, being the defendant, was not a competent witness in the action generally, but was only permitted to be examined in his own behalf, on the ground that Truman, the plaintiffs' assignor, had been examined on behalf of the plaintiffs, who derived their title through or from him. The occasion which called on Burbank to testify, being the examination of Truman, his testimony should therefore have been limited to the occasion which called for it, and his examination confined to matters which were responsive or relative to the testimony of Truman. This I understand to be the plain

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requirement of the Code, when it says, in substance, that when an assignor of a thing in action, or contract, is examined as a witness on behalf of his assignee, the adverse party may offer himself as a witness *to the same matter* upon which the assignor has been examined, in his own behalf. This also appears to be the construction put upon this part of the 399th section of the Code, by the supreme court in the third district.

In the case of *Potter agt. Bushnell*, (10 How. Pr. R. 96,) HARRIS, Justice, in delivering the opinion of the court, remarked, "that he did not think that in offering himself as a witness, he (the adverse party mentioned in the 399th section,) the defendant, was required to specify the matter to which he proposed to testify." The proper practice is to offer the party as a witness generally. He is to be sworn like other witnesses, to give testimony in the action. Should it be proposed, upon his examination, *to go beyond the matters embraced in the examination of the assignor*, the evidence, upon objection, would be excluded. This is what was done by the justice in the case under consideration. But the counsel for the respondents, on the argument of this appeal, claimed a much more extensive signification for the word *matter*, as used in the Code. He insisted that it meant, "subject of complaint, thing treated of, suit, demand," &c.; and that, as Truman had been examined as a witness in behalf of his assignees in this *suit*, or controversy, Burbank had a right to offer himself as a witness, in his own behalf, in the *same suit*, or controversy. That as the agreement to build the saw-mill, and the performance of that agreement, were both the subjects of controversy, or things treated of in action, they constituted the same matter. Therefore, that as Truman had testified that he made a contract with Burbank to *build* the mill, Burbank was a competent witness to prove, in his own behalf, that he *had* built it. The strangeness and apparent absurdity of such conclusion will be avoided by adhering to the language and true meaning of the Code, and confining the testimony of the adverse party, when offered under the 399th section of the Code, to the subject upon which the assignor may have been examined; and requiring it

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to be responsive, or at least relative to that examination. In this respect the justice did right, and his judgment ought not to have been reversed.

The judgment appealed from is, therefore, erroneous, and must be reversed.

SUPREME COURT.

CHRISTY agt. MURPHY and others.

The original establishment and designation of "*Christy's Minstrels*," entitles the founder thereof to the protection and benefit of that appellation exclusively. Without a proper license, the assumption and use of that *style and name of amusement* by others, will be perpetually restrained by injunction, under the law prohibiting the pirating of trade-marks.

New-York Special Term, Feb., 1856.

F. S. STALLKNECHT, *for plaintiff.*

J. M. VAN COTT, *for defendants.*

CLERKE, Justice. It is now well established that the court will grant an injunction against the use by one tradesman of the trade-marks of another. Will this protection be extended to enterprises undertaken for the purpose of affording amusement or recreation to the public?

With regard to trade, it may be alleged that the interests of commerce and the encouragement of industry manifestly require and deserve the interposition of the court; while the well-being of society is not sufficiently concerned to require the extension of this species of protection to undertakings of which the main, if not the sole object, is, at the best, mere pastime. This can be the only ground to which it can be plausibly claimed that the court can make any difference in interposing relief between the present case and an ordinary case of trade-marks. But I

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have been unable to discover any essential difference in kind, in reference to this subject, between establishments formed for the purpose of trade and those formed for the purpose of mere amusement. There may be, in degree, a difference, and a considerable difference, in the respectability and utility of such undertakings; but while neither exercises, or is necessarily calculated to exercise any demoralizing influence, I consider one as well entitled to the protection of the law as the other.

"Man does not live by bread alone;" that is, the complete enjoyment, even of his physical existence, does not depend upon mere food or raiment, or other material substances, but upon the exercise of the various and numerous mental and moral faculties with which God has endowed us. It may be as necessary to laugh as to eat; and I am persuaded, if people *would eat less, and laugh more*, that their moral as well as physical well-being would be materially improved. The gravest of poets sings—

"The love of pleasure is man's eldest born;
Wisdom, her younger sister, though more grave,
Was meant to minister, and not to mar
Imperial pleasure, queen of human hearts."

It is unquestionably the duty of courts to regard with disfavor every establishment having any tendency to corrupt the public morals, to create idle or dissipated habits, to encourage a craving for undue excitement, or to impair the taste for domestic attachments and domestic society.

Nothing has been shown, in this motion, to induce me to believe that the establishment of the plaintiff had any tendency to produce effects of this description. His entertainments may not be of that kind in which men of the highest refinement and delicacy of culture, would take any particular delight, but they serve a very salutary purpose, if they afford diversion and music to the million at a small expense, and without the dissipation and silly display of places of much greater pretensions.

The plaintiff organized and established, in 1842, a band of performers of negro minstrelsy, which he shortly afterwards

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named, after himself, "Christy's Minstrels." He was the first who established this species of entertainments. When he commenced it, he incurred some expenditure of time, labor and money, and continued it with success in this city until the fall of 1854, when he suspended it here, and went to California. After an absence of some months, he returned. He has not yet resumed his performances; but declares that it is his intention soon to do so. In the meantime, the defendants—(most of whom belonged to his band)—but were merely employed by him as performers, at a certain stipend, have assumed the style and name of "Christy's Minstrels;" and he asks the court to enjoin them against continuing the use of this name.

For the reasons I have mentioned, I think he is entitled to its exclusive use; and, unless he has given to the defendants a license to use it, his application must be granted.

The defendants have furnished no satisfactory evidence of such a license; and if they had, unless they could also show it was irrevocable, they would have no right to continue the use of this name one moment after he signified his intention to discontinue or withdraw the privilege.

The motion to continue the injunction granted, with \$10 costs.

SUPREME COURT.

ABRAHAM TOLL, assignee of THE MOHAWK VALLEY FARMERS' INSURANCE COMPANY agt. ADAM CROMWELL.

The plaintiff, residing in Schenectady county, brought his action upon a promissory note against the defendant, residing in Schoharie county, and laid his *venue* in Albany county. The defendant, in due time, properly demanded that the venue be changed to the proper county. Subsequently the defendant served his answer and motion papers for a change of the venue (for convenience of witnesses) to Schoharie. The plaintiff thereupon amended his complaint, by changing the venue to Schenectady—which was the only amendment

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This amendment deprived the defendant of the right to his motion for a change of the venue on his demand; and, not having served an amended answer, the question was, whether he was deprived of his motion on the ground of convenience of witnesses—the cause not being at issue.

Held, that the defendant could be saved, by the provision that the plaintiff's right to amend his complaint should be *without prejudice to the proceedings already had*. If the defendant had a right to make his motion when he served his papers, the fact that the amendment of the complaint had only technically destroyed the issue, should not deprive him of the motion upon the merits, where it appeared that his facts and grounds of motion were adapted as well to the amended as the original complaint.

Albany Special Term, July, 1855.

MOTION to change the venue.

This action was brought upon a note made by the defendant, payable to the plaintiff's assignors. The plaintiff resides in the county of Schenectady, and the defendant in the county of Schoharie. The venue was in the county of Albany. The defendant's attorney, in due time, served upon the plaintiff's attorneys a demand, that the trial be had in the proper county. After the service of such demand, the defendant put in his answer, alleging, in substance, that the note upon which the action was brought had been obtained fraudulently.

Upon an affidavit stating these facts, and also stating that the defendant had a large number of witnesses, who were material to his defence, residing in the county of Schoharie, giving their names and places of residence, and stating the facts in respect to which he deemed such witnesses necessary, the defendant gave notice of a motion to change the place of trial from Albany to Schoharie.

After being served with the answer of the defendant, and a copy of the affidavit, and notice of motion, the plaintiff's attorneys amended their complaint by changing the place of trial from Albany to Schenectady. The plaintiff did not claim to have any material witnesses either in Albany or Schenectady.

J. K. PORTER, *for plaintiff.*

R. L. MARTIN, *for defendant.*

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HARRIS, Justice. The defendant, at the time he gave notice of this motion, was entitled to move upon two grounds. He had demanded that the venue be changed to the proper county, and the plaintiff had not tendered a consent that it should thus be changed. He was, therefore, entitled to move under the *first* subdivision of the 126th section of the Code. The cause, too, was at issue; and his affidavit showed that the convenience of witnesses required that the venue should be changed. This entitled him to move under the *third* subdivision of the same section.

But, after the notice of the motion was served, the plaintiff, as he had a right to do under the 172d section of the Code, amended his complaint. The only change made by the amendment was, to change the venue from Albany to Schenectady, where the plaintiff resided. By this means he deprived the defendant of the first ground of his motion. The venue was now in a proper county, though not the same county to which the defendant desired to have it changed. The court would not be authorized to grant the motion to change the venue from Schenectady to Schoharie, merely because it was the place of the defendant's residence. The decision of the motion, therefore, may depend upon the right of the defendant to have the venue removed to Schoharie for the convenience of witnesses.

That the venue should go to Schoharie upon this ground, sufficiently appears. Indeed, it is not pretended that the plaintiff has any witnesses in Schenectady. But the plaintiff insists that the motion cannot be granted, for the reason that the cause is not at issue. This is, technically, true. Though when the notice of the motion was served, issue had been joined by the service of an answer, yet, by the service of an amended complaint, that issue was destroyed, and the defendant was at liberty—perhaps required—within twenty or forty days, according to the manner in which the amended complaint was served, to put in a new answer. The issue might thus be entirely changed, and witnesses who might have been material under the issue, as it was first made, might not be required under the new issue.

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But it is expressly declared that the plaintiff's right to amend his complaint shall be *without prejudice to the proceedings already had*. If effect is to be given to this provision, the defendant cannot be turned out of court, upon his motion, upon the ground that it is premature. When he served his notice of motion, he had the right to make it—more than this, it was his right to have it granted. If, by the amendment, the issue had been so changed as to make it apparent that the defendant's witnesses would not be required upon the trial, the motion might be denied upon the merits. Or, if the question were rendered doubtful or uncertain by the amendment, it might be proper to order the motion to stand over, for the purpose of allowing the moving party to serve new papers. But, at any rate, as the amendment was not to prejudice the proceedings already had, the defendant was entitled to have the motion decided upon the merits.

In this case, as the only change made in the complaint by the amendment is the venue, it is obvious that the affidavit upon which the motion is founded is as applicable to the issue to be made upon the amended complaint, as it was to the issue as it existed when the affidavit was made. The contrary is not pretended. There is no reason, therefore, why the motion should not be granted.

An order must be entered in this, and the five other causes depending upon the same question, changing the place of trial from the county of Schenectady to the county of Schoharie. The costs of the motions are to abide the event of the actions.

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SUPREME COURT.

THE PEOPLE agt. FRANK QUANT.

The legislature of this state has the power to enact laws prohibiting the sale of intoxicating liquors, and to provide penalties for their violation.

The act of April 9, 1855, so far as it prohibits the sale of intoxicating liquors, imposes penalties for its violation, and provides for their enforcement, is not in conflict with any article or section of the constitution of the United States or of this state. (*See People agt. Berberrick & Tynbee*; 11 *How. Pr. R* 289, *contra*, and *Wynhamer agt. The People*, *id.* 530, *in accordance with this decision.*)

The courts can only declare an act of the legislature void when it conflicts with the written constitution.

The legislature is the sole judge of the necessity for such laws as it shall enact, and unless its acts trench upon the provisions of the constitution, they become the law of the state, and are beyond the reach of judicial repeal.

Life, liberty and property, although entitled to protection, are each liable to forfeiture for a violation of the law. If an act, or any portion of it, is otherwise constitutional, the violators of such act, or portion, may be deprived of their property under its provisions, and it will be by "*due process of law.*"

It is not necessary for the prosecutor, under this act, to disprove any qualification, or show that the case does not come within any exception or saving clause. If the liquor sold was for any reason privileged, the burden of establishing that privilege rests with the defendant.

Foreign liquor, after it has passed beyond the hands of the importer, or the original package is broken for use or sale, so that it ceases to be foreign commerce, is not exempted from the operation of the statute by the last clause of section one.

Those sections of the old excise law, which prohibited the sale of all liquors in quantities less than five gallons without a license, are not repealed by this act, but still remain in force.

It seems, that the second section of article 1 of the constitution, (which provides that "the trial by jury, in all cases in which it has been heretofore used, shall remain inviolate forever,") does not apply to trials for offences below the grade of grand larceny.

Fourth District, General Term, Ballston, Dec. 31, 1855.

Present, C. L. ALLEN, JAMES and BOCKES, Justices.

By the court—JAMES, Justice. The defendant, Quant, was arrested and brought before a justice of the peace of Montgomery county, charged with a violation of the first section of

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the act passed April 9th, 1855, entitled "An Act for the Prevention of Intemperance, Pauperism and Crime." A motion was made to quash the warrant of arrest, for irregularity, which was denied. A complaint was then exhibited against the defendant, charging him with selling intoxicating liquors: keeping them with intent to sell, giving away such liquors, and keeping them with intent to give away, &c.

The defendant took issue upon the complaint, and the cause proceeded to trial before a justice, as a court of special sessions, with a jury. The fact of selling gin, whiskey and beer, at various times, to be drank in his house, and of keeping it for the purpose of sale, was clearly and distinctly proved; the jury found the defendant guilty, and the court adjudged him to pay a fine of \$50 and costs. From that conviction and sentence this appeal is brought.

The important questions which arise on this appeal are the constitutionality of the prohibitory feature of the act of April, 1855, whether foreign liquors are exempted from its operation, and whether any portion of the old excise law is still in force.

If the prohibitory feature of the act of 1855 be unconstitutional, it must be by reason of its conflict with some provision of the constitution of the state, or of the United States. To a correct appreciation of this question, it is important that the difference in character between the state and national constitutions should be understood and remembered. The constitution of the United States consists only of powers delegated by the states, and by the people of the states; and powers not thus delegated, or necessarily implied, or prohibited by it to the states, are reserved by it to the states respectively, or to the people thereof. (*Tenth amendment U. S. Cons.*) The right to regulate commerce with foreign nations was one of the powers delegated.

First. So far as the constitution of the United States is concerned, I consider the question conclusively settled by the cases in 5 *How. U. S. Rep.* p. 504, and subsequent pages. Those cases seem to cover the whole ground. One of those cases involved the constitutionality of the liquor law of New Hamp-

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shire, which entirely prohibited sales. These cases were twice argued by able counsel, and each judge delivered his own opinion, and the decision was unanimous that the law was constitutional, and that it was legitimately within the province of the legislature to enact it. The chief justice, in his opinion, said, "The power of congress over commerce does not extend further than the regulation of it with foreign nations, and among the several states; that beyond these limits the states have never surrendered their power over trade and commerce, and may still exercise it, free from any controlling power on the part of the general government. Every state, therefore, may regulate its own internal traffic, according to its own judgment, and upon its own views of the interest and well-being of its citizens." Again: "If any state decrees the retail and internal traffic in ardent spirits, injurious to its citizens, and calculated to produce idleness, vice, or debauchery, I can see nothing in the constitution of the United States to prevent it from regulating and restraining the traffic, or from prohibiting it altogether, if it thinks proper. Of the wisdom of this policy it is not my province or my purpose to speak. Upon that subject each state must decide for itself. I speak only of the restriction which the constitution and laws of the United States have imposed upon the states." (*See also 7 How. U. S. Rep. 283; 11 Pet. 102; 1 Kent's Com. 391.*)

Second. Does the prohibitory feature of the said act of April, 1855, conflict with any provision of the state constitution? This question may properly be classed under two heads: 1st. The power of the legislature. 2d. The restriction of the constitution.

1st. As to the power of the legislature. The constitution of the state is not a grant of power. It was created by the people in their sovereign character, and is a restriction upon the powers which the legislature would otherwise possess by the common law were there no constitution. The acts of that body within the restrictions imposed by that instrument, "are as absolute and uncontrollable as the laws flowing from the

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sovereign power under any other form of government." (1 *Kent's Com.* 448.)

This is a representative government, and when the representatives of the people, in their legislative capacity, enact a statute, it is the sovereign will declared by the proper authority of a legally-constituted government. Such act, unless in conflict with the constitution, is the law of the state, binding upon the citizens and the courts.

In *Cochran agt. Van Swelby*, (20 *Wend.* 381,) Senator VER-PLANK remarks, "It is difficult, upon any general principles, to limit the omnipotence of the sovereign legislative power by judicial interpretation, except so far as the express words of a written constitution give that authority. There are indeed many *dicta*, and some great authorities, holding that acts contrary to the first principles of right are void. The principle is unquestionably sound as the governing rule of a legislature in relation to its own acts, or even those of a preceding legislature. * * *

* But I can find no authority for a court to vacate or repeal a statute on that ground alone."

In 5 *How. U. S. Rep.*, above stated, Mr. Justice M'LEAN says, "In all matters of government, and especially of police, a wise discretion is necessary. It is not susceptible of an exact limitation, but must be exercised under the changing exigencies of society. In the progress of population, of wealth, and of civilization, new and vicious indulgences spring up, which require restraints that can only be imposed by the legislative power. When this power shall be exerted, how far it shall be carried, and when it shall cease, must mainly depend upon the evil to be remedied. To guard the health, morals, and safety of the community, is one duty of government: to that end the laws of a state may prohibit the sale of property, and even authorize its destruction."

"The lawgiver," says Chancellor KENT, "has the right to prescribe the mode and manner of using property, so far as may be necessary to prevent the abuse of the right, to the injury or annoyance of others, or the public. The government may, by general regulations, interdict such uses of property as would

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create nuisances, and become dangerous to the lives, or health, or peace, or comfort of its citizens."

And, in an opinion by one of the ablest lawyers, written to defeat the operation of this law, the principle was conceded, "that the state legislature, in its sovereign capacity, may regulate property, and under this head may restrict and control its use, regulate the mode of sale, and even prohibit its use altogether. They may also direct its destruction at once and absolutely. But all this must be done, and can only be done, for some legitimate ulterior purpose within legislative competency. They may do all this when necessary for the preservation of life or health—of religion or morality. But in a free country, where property is protected under a paramount fundamental law, the necessity must clearly exist."

He there hinges his opinion on the question, whether the legislature or the court is ultimately to determine this necessity. He holds that the power rests with the court. In that, I think him mistaken. The judiciary have no power or authority to declare void an act of the legislature solemnly passed, either on an assumed ground of natural equity or want of probable cause. (20 *Wend.* 881.)

The courts can only declare an act of the legislature void when it conflicts with the constitution. Any principle which would allow the judiciary to go further, and judge of the necessity of legislative enactments, and as they should deem them necessary or unnecessary, declare them valid or invalid, would place the people, in their representative capacity, subordinate to the judiciary and the courts higher than the constitution. I cannot subscribe to any such monstrous theory. The legislature must be its own judge of the necessity for such laws as it shall enact; there the power is reposed by the common law, recognized and sanctioned by the constitution; and unless its acts trench upon the provisions of that instrument, they become the law of the state, and are beyond the reach of judicial repeal. (*De Camp* agt. *Eveland*, 19 *Bar.* 83, 93; *Hartwell* agt. *Armstrong*, 19 *Bar.* 168-9.) If the legislature prove unequal to the trust, or violate the confidence reposed in them, the

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means of correction is to be found in our periodical elections.
(19 Bar. 83.)

2d. Does that part of the present act under consideration, conflict with the constitution of the state? The ground of objection is thus stated by counsel: "This law destroys the second and sixth sections of article first of the state constitution under which the rights and privileges of the citizen are secured, as well as his life, liberty and property;" and for other considerations the court are referred to that numerous catalogue of extra-judicial opinions, which have, since the passage of this law, been circulated in every portion of the state.

The second section of Article 1 of the constitution is as follows:—"The trial by jury, in all cases in which it has been heretofore used, shall remain inviolate forever." Surely, the principle of prohibition in no particular interferes with the right of trial by jury; and the right of trial by a common-law jury of twelve men, by virtue of the constitution, to persons guilty of offences below the grade of grand larceny, as I have endeavored to show in another case decided this same term.

That part of section six to which reference is made is as follows:—"No person shall be held to answer for a capital, or otherwise infamous crime, unless on presentation or indictment by a grand jury; nor shall he be compelled, in any criminal case, to be a witness against himself; nor be deprived of life, liberty, or property, without due process of law."

It will be perceived that no part of this section has any application to the question presented by this appeal. That part of the act prohibiting the sale of intoxicating liquor, and providing penalties for its violation, creates no "infamous crime," as defined by our statutes; compels no one to be a witness against himself; nor deprives any one of life, liberty, or property, without due process of law. If other parts of the act conflict with this or any other section of the constitution, it will not affect the validity of those provisions free from such objections. (*Fisher agt. M'Gin*, 1 *Gray's Mass. Rep.* 21.) By this, however, I do not mean to concede that any portion of the provisions of the act of April, 1855, are in conflict with the con-

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stitution. I only mean to be understood as confining myself strictly to the questions legitimately before the court.

One of the main arguments urged against this law is, that liquor is property, and as such entitled to protection under the last clause of the section of the constitution above cited. That intoxicating liquor is property, is freely conceded ; it is so recognized throughout the act. The right to acquire, hold and traffic in property is recognized as a natural right ; and when acquired, is entitled to claim and receive protection from the law. Life, liberty, and property, although entitled to protection, are each liable to forfeiture for a violation of the law. Thus, "if a man commit murder, he forfeits his life ; if he commit felony, he forfeits his liberty ; if he commit a misdemeanor, he forfeits his property, by way of a fine." But this can only be done by due process of law.

And what is due process of law ? "Law is a rule of action prescribed by a superior, and which an inferior is bound to obey :" and process of law is the mode of proceeding in the several courts, prescribed by the law-making power. There is process by the common law, and process by the statute law.

In the act of April, 1855, the mode of proceeding is provided by the law itself, and is by process of statute law. If the act, or any portion of it, is otherwise constitutional, the violators of such act, or portion, may be deprived of their property under its provisions—and it will be by due process of law.

Prohibiting the sale of liquor as a beverage does not destroy it as property. Its sale for mechanical, chemical and medicinal purposes are allowed by the act. It is true, that limiting and restricting the purposes for which liquor may be sold, may depreciate its price in the market ; still, as property, it is physically untouched, and as useful as ever, for all other purposes. Although unconstitutional to pass laws depriving a citizen of his property, a law, the tendency of which is to reduce the price of certain species of property in the market, will not, for that reason, be declared unconstitutional.

I have not been able, from the light afforded me by the counsel for the defendant, even with the aid of the numerous

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opinions to which the court were cited, to find the first section or clause in the constitution of this state, which, by word or implication, restrains the legislature from passing laws regulating or prohibiting the traffic in intoxicating liquors, and providing penalties for its violation; nor have I been able to discover that the prohibitory clause of the act under consideration conflicts with any of the provisions of that instrument.

Third. It is next insisted that the conviction was wrong, because "it was not proved that the liquor sold or given away was not liquor, the right to sell which in this state is given by any law or treaty of the United States." I had supposed the law well settled that, "in an action for penalty given by statute, it was not necessary for the prosecutor to disprove any qualification; that in such case the *onus probandi* lay upon the defendant." It was so held in *Potter* agt. *Deyo*, (19 Wend. 361,) and the principle recognized in *Smith* agt. *Joyce*, (12 Bar. R. 21, 26.) I regard such still to be the law; and in this case, if the liquor sold was for any reason privileged, the burden of establishing that privilege rested with the defendant.

But I deny that foreign liquors, when sold by any other than the importer, in the original package, are by the act exempted from the operation of this law. The first section prohibits the sale of all intoxicating liquor, except as provided by said act, and closes with these words: "This section shall not apply to liquor, the right to sell which in this state is given by any law or treaty of the United States." It is under this clause that foreign liquor is claimed to be exempt. There is no express law or treaty of the United States which gives the right to sell liquor in this state. The right to sell is only claimed as incident to the right to import; and the United States supreme court held, that as the right to regulate commerce with foreign nations is vested solely in congress, and as under that right congress admits the importation of foreign liquor in packages, that while such importation continues in the hands of the importer, in the form and shape it was introduced, it continues a *part of the foreign commerce* of the country; and that the authority to import necessarily carried with it the right to sell, in the form

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and shape in which it was imported : but when the original package was broken up for use or retail by the importer, or had passed from his hands into the hands of a purchaser, *it ceased to be an import*, and became subject to the laws of the state. This is all the law, or treaty of the United States, on the subject. The clause of section first was added to avoid conflict with this decision.

But it is argued that the right to sell by the importer, even though it be in the original package, being conceded, it is liquor the right to sell which is given, and that being once exempted from the operation of the law, it so continues, no matter through how many changes it may afterwards pass. If such construction comported with the intent of the legislature, and fulfilled the purposes sought to be accomplished by the act, it might be adopted without doing violence to the language of that particular clause of the act. But it is apparent that such construction would be entirely foreign to the intent of the legislature, and operate to defeat the very object and purposes of the statute.

In the construction of statutes the intention of the maker is to govern, although such construction may seem contrary to the letter of the statute. (1 *Pet. Rep.* 64; 2 *id.* 662; 15 *J. R.* 358; 3 *Cow. R.* 89; 1 *Sel.* 562.) So in statutes penal, as well as others, an interpretation must never be adopted that will defeat the purposes of the act if it will admit of any other reasonable construction. (1 *Sel.* 562; 9 *Wheat.* 381.)

Penal statutes are to be construed strictly, but not against the manifest intent of the legislature. (2 *J. R.* 879; 2 *Cow. Rep.* 410; 5 *Wheat.* 76; 8 *Pick.* 870.) If the general meaning and objects of a statute should be inconsistent with the literal import of any particular clause or section, such clause or section should be construed according to the spirit of the act, if the intent of the legislature be clear and manifest. (1 *Pick.* 248; 10 *id.* 235; 20 *id.* 267.) Remedial statutes are to be so construed, if possible, as to suppress the mischief and advance the remedy. (1 *Ham.* 206, 385, 481.)

Many other authorities might be cited to the same effect.

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Whether or not the language used in the last clause of section first was the most clear and explicit that could have been adopted, to enunciate the intent of the legislature, it is not now important to inquire. The intent is so apparent from the whole act taken together, that it can only be mistaken by the wilfully blind. If the usual mode of construing statutes is adopted for the construction of this act, foreign liquors, after they cease to be "a part of the foreign commerce," are no more exempted from its operations than are liquors manufactured within the state.

Fourth. It was further insisted that "the legislature had no power to prohibit the pursuit of any of the common avocations of life, or of any of the ordinary means of obtaining a livelihood." I have already said all that is necessary of legislative power. Before the passage of this act, the sale of intoxicating liquor, in quantities less than five gallons, unless the vendor had a license, was prohibited by law; and it is difficult to distinguish the difference between prohibition in the present law, and the principle which lay at the foundation of the old excise law. The difference, I apprehend, is only in degree. Licenses to sell, as a beverage, are now prohibited altogether, while under the old law such licenses were permitted, and a commission created which might issue them; but the commissioners were not bound to license. (*1 Hill's Rep.* 655.) They might refuse, and sometimes did refuse; and when they did so, prohibition under five gallons, was as complete within their jurisdiction as now. By the present act, the legislature has assumed to themselves the discretion formerly vested in the board of excise, and said no license shall be granted.

Prohibition was a prominent feature of the old law, and yet it was never, for that reason, deemed unconstitutional. It is true, the old law did not interfere with the traffic in quantities above five gallons, but that does not affect the principle. If it was constitutional for the legislature to prohibit the traffic in quantities less than five gallons, it most assuredly is in quantities over five gallons. The power existing, it may be exer-

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cised at such times, and in such manner as the legislature shall see fit.

But supposing the act of 1855 void, the old excise law would then be left in full force. The defendant is shown to have sold gin, beer and whiskey at different times, to be drank in his house. This he had no right to do under that law without a license—and it is not pretended that he had any such license. In such event, he would be liable under the old law for a greater penalty than was imposed by this conviction, although entitled to a discharge from this particular proceeding.

According to my understanding, certain sections of the old law still continue in force, notwithstanding the validity of the new statute. The act of April, 1855, only repeals those acts and parts of acts inconsistent therewith. Those provisions of the old law which prohibit the sale of intoxicating liquor without a license, are in no particular inconsistent with the present act, and therefore, by the well-established rules of construction, they are not repealed. In the language of Justice EDMONDS, “The several statutes, operating upon the same subject, being *in pari materia*, are to be read together as one law, and they say no man shall sell without a license, and no man shall have a license.”

Several points, preliminary to the principal questions, were made by the defendant, none of which I deem well taken.

My conclusions from these premises are, that the legislature of this state has the power to enact laws prohibiting the sale of intoxicating liquors, and to provide penalties for their violation.

That the act of April 9, 1855, so far as it prohibits the sale of intoxicating liquors, imposes penalties for its violation, and provides for their enforcement, is not in conflict with any article or section of the constitution of the United States, or of this state.

That foreign liquor, after it has passed beyond the hands of the importer, or the original package is broken for use or sale, so that it ceases to be foreign commerce, is not exempted from the operation of the statute by the last clause of section one.

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That those sections of the old excise law, which prohibited the sale of all liquors in quantities less than five gallons without a license, are not repealed by the present act, but still remain in force.

The conviction and sentence of the special sessions should be affirmed.

[The decision was unanimous by the judges present, and is also said to be concurred in by the new judges, PAIGE and ROSEKRANS, of the same district.]

SUPERIOR COURT.

DAVID O'NEIL and others agt. FREDERICK F. DURKEE.

A motion to *vacate* an order of *arrest*, must be made, if at all, before the *justification of bail*.

And the *justification of one* of two sureties, as bail, is not sufficient. Both must justify; and such justification is not complete until the judge has endorsed his allowance on the undertaking, and filed it with the clerk. Before this is done, the defendant is in time to move to *vacate* the arrest.

Special Term, Feb. 14, 1856.

This was a motion to vacate an order of arrest, under § 204 of the Code.

The defendant was arrested on the 21st of December, 1855. On the 22d December he gave bail, with the usual justification on the undertaking. On the 29th of December, the plaintiff excepted to the sufficiency of the bail.

On the 8th of January the defendant gave notice of justification for the 18th of that month. On the 17th of January defendant gave notice of the motion to vacate the order of arrest for the 28th of that month. On the 18th the attorneys for each party appeared at chambers, in pursuance of the notice of justification; and on motion of the defendant's attorney, the justification was adjourned by order of the court to the next day.

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On the following day (19th) the attorneys for each party attended at chambers, and the defendant's bail were examined in the matter of the justification. The examination of one of the bail was signed, and was sworn to by him ; but the other bail, on being examined, was found to be clearly insufficient ; his deposition was not sworn to, and the justification of bail was further adjourned by order of the court, to the 23d of January.

What was done on that day does not appear ; but there is no pretence that other bail has as yet been submitted.

On the 28th of January the motion to vacate the order of arrest was brought on pursuant to the notice aforesaid, and a preliminary objection is made that the defendant has precluded himself from the motion by the steps he has taken to justify his bail.

CHAPMAN & HITCHCOCK, for plaintiffs.

BRITTON & ELY, for defendant.

SLOSSON, Justice. By § 204 of the Code, a motion to vacate the order of arrest must be made, if at all, "before the justification of bail." The defendant is in time, if he makes the motion before the bail is actually perfected. The bail becomes perfect, if not excepted to by the plaintiff, within ten days after receiving from the sheriff a copy of the undertaking ; and if that period expires, and the defendant has given no notice of motion to vacate the order of arrest, he is then too late. If the plaintiff gives notice of exception to the bail, they become perfect by actual justification, and the motion to vacate the arrest is in time at any period before such justification. The reason of the rule is, that the defendant, by permitting the bail to become perfect in the one case, and by actually perfecting them in the other, without, in either, taking the necessary steps to procure the order of arrest to be vacated before the bail becomes perfect, admits that the arrest was regular and on sufficient grounds. (*Lewis agt. Truesdell, 8 Sand. 706*; *Wilmerding agt. Moon, 1 Duer, 615*.) In the present instance, the plaintiff excepted to the bail within the ten days, and the defendant gave

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notice of justification within the time allowed by law, (§ 193, Code,) and before the expiration of the time embraced in the last notice, gave the notice of the present motion to vacate the order of arrest.

On the day prescribed, on the notice of justification, both parties appeared, and one of the bail established his sufficiency by affidavit, but the other was found clearly insufficient, and the further justification was adjourned by the court. The bail, therefore, did not justify on the 18th. Both must justify; and it is not clear but that the omission of one to justify is fatal to both. Further time being given by the court would probably prevent this consequence. (*Archbold's Pr.* p. 89.)

But it is not the proof of their sufficiency merely, which constitutes the justification of bail. Such justification is not complete until the judge has endorsed his allowance on the undertaking, and caused the same to be filed with the clerk—until that is done, the bail is not perfected, and the sheriff is liable. (§ 196, *Code*, 1 *Arch. Pr.* 89.) Had the bail been actually perfected on the 23d of January, to which day the court adjourned the justification, a question might arise whether this motion, made on the 28th of January, would not be too late, though noticed for that day as early as the 17th of that month; but it is unnecessary to consider that question, as I do not understand the parties to allege that the justification has, in fact, ever yet taken place.

There is nothing, therefore, to preclude the defendant from making his motion, and the preliminary objection must be overruled, and the motion to proceed. Costs to abide the event of the motion.

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NEW-YORK PRACTICE REPORTS.

In the matter of the Extension of the Bowery, &c

SUPREME COURT.

IN THE MATTER OF THE EXTENSION OF THE BOWERY, FROM
CHATHAM-SQUARE TO FRANKLIN-SQUARE, IN THE CITY OF
NEW-YORK.

The *jurisdiction* of the supreme court, in reference to the proceedings for opening and extending streets, &c., in the city of New-York, is wholly derived from the statute relating to such proceedings.

The *power* vested in the court by that statute is *supervisory*, and not appellate. It was evidently the intention of the legislature to vest in the court a broad *discretion* in the exercise of this power. Its office is to see that no injustice is done.

The exercise of a power so entirely *discretionary* is not the subject of review upon *appeal*. Hence, it is declared by that statute that the report of the commissioners of estimate and assessment, when confirmed by the court, *shall be final and conclusive upon all parties*; and the title to the property proposed to be taken for such improvement shall, upon such confirmation, vest in the corporation.

Quere? Whether this proceeding, in reference to opening streets, &c., can be called a *special proceeding*, within the meaning of that term, as defined in the third section of the Code, which declares that every other *remedy*, except such as are obtained by an action, is a *special proceeding*.

If an application for such confirmation is a *special proceeding*, within the meaning of the Code, or the act of 1854, the decision thereon is not the subject of review upon appeal; though it comes within the letter of the Code, and that statute authorizing an appeal: because the jurisdiction of the court is taken away by the statute under which the proceedings originated, which declares, "that the order, or judgment of the court, in the premises, *shall be final and conclusive*."

This having been settled, in respect to an appeal from such an order, from the general term of the supreme court to the court of appeals, it must be equally true in respect to an appeal from an order made at *special term* to the *general term*. The order, when made at *special term*, is equally the order of the *supreme court*, as if made at the general term.

It is a familiar rule, that an appeal will not lie from an order which the court was authorized to make or not, in its discretion.

The statute, when it says, "that the order, or judgment of the court, in the premises, *shall be final and conclusive*," is evidently speaking of the *original* order or decision of the court in the premises, *in the first instance*, and not the last order the court would ordinarily have power to make. *Per Peabody, J.—Clerke, J. dissenting.*

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New-York General Term, Feb., 1856.

HARRIS, Justice. The provisions of law relating to the opening of streets, &c., in the city of New-York, form a system of proceedings entirely peculiar, and complete in itself. The jurisdiction of this court in respect to such proceedings is wholly derived from the statute. And that jurisdiction is so restricted that for many years the judges of the court regarded themselves as acting in the capacity of commissioners, vested with limited judicial powers by the legislature in reference to such proceedings, and not as a court. It is true that this theory no longer prevails; yet it is not the less true that the court, in such cases, exercises a limited power, conferred exclusively by the provisions of the statute relating to such proceedings.

The corporation of New-York, having resolved upon the improvement, is authorized to make application to the court for the appointment of commissioners, and it is declared that it shall be lawful for the court, upon such application, to nominate and appoint three discreet and disinterested persons commissioners of estimate and assessment. This is the extent of the power vested in the court at this stage of the proceeding. The commissioners thus appointed are required to make their report to the court; and, upon the coming in of such report, it is made the duty of the court, "after hearing any matter which may be alleged against the same," either to confirm it or send it back for reversal. If it is sent back, it may be to the same or new commissioners, in the discretion of the court. If a new report is made, the court may confirm it, or again send it back for revision, and so on, until the court shall think proper to confirm the action of the commissioners.

The power thus vested in the court is supervisory, and not appellate. It was evidently the intention of the legislature to vest in the court a broad discretion in the exercise of this power. Its office is, to see that no injustice is done. Technical errors will be disregarded; and if, upon a review of the whole

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case, it appears that substantial justice has been done by the commissioners, their proceedings will be confirmed.

It is not to be supposed that the exercise of a power so entirely discretionary would be made the subject of review upon appeal. Hence we find it declared, that the report, when confirmed by the court, *shall be final and conclusive upon all parties*, and the title to the property proposed to be taken for such improvement, shall, upon such confirmation, vest in the corporation.

I do not think it very clear, that the application to the court for a confirmation of the report of the commissioners, for which the statute thus provides, is a *special proceeding*, within the meaning of that term, as it is defined in the third section of the Code, which declares that every other *remedy*, except such as are obtained by an action, is a *special proceeding*. These *remedies*, I suppose, are such as are incident to the powers of a court of general jurisdiction—such as mandamus, prohibition, habeas corpus, and the like. I do not think that the proceeding, to obtain the confirmation of the report of commissioners, under the statute referred to, is, in any proper sense of the term, a *remedy*.

But, conceding this point, and that the application for the order of confirmation is a *special proceeding*, I do not think the decision of the court upon such application is the subject of review upon appeal. It is declared, by the eleventh section of the Code, among other things, that the court of appeals shall have jurisdiction to review, upon appeal, every actual determination of the supreme court, in general term, in a final order affecting a substantial right, "*made in a special proceeding*." The order of confirmation is a final order. It affects substantial rights, and, for the purpose of the argument, it is conceded to be a *special proceeding*. The order, it is conceded, may be made by the supreme court at a general term. The case is thus brought within the very terms of the section of the Code, prescribing the jurisdiction of the court of appeals. And yet it has just been held by that court, that it has no jurisdiction to review, upon appeal, such an order. This jurisdiction is denied upon

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the ground that, though the case is within the very letter of the statute defining the jurisdiction of the court, yet it is taken away by the statute under which the proceedings originated, which declares "that the order, or judgment of the court, in the premises, *shall be final and conclusive.*"

If this be so, in respect to an appeal from the general term to the court of appeals, I cannot see why it is not equally true in respect to an appeal from an order made at special term to the general term. The order, when made at special term, is not less the order of the supreme court than when made at general term. In either case, it is "the order or judgment of the supreme court in the premises." This order, it is declared, shall be final and conclusive. And yet, by this appeal, it is insisted that the order thus made is not final and conclusive, but that this court has the power, and ought to reverse it.

This power is sought to be sustained by the act of 1854, which declares that an appeal may be taken to the general term from any judgment, order, or final determination made at a special term, in *any special proceedings.* As in the case of the eleventh section of the Code defining the jurisdiction of the court of appeals, so here, the language of the statute is broad enough to embrace the case in hand. But if the statute which declares that the court of appeals shall have jurisdiction to review an order of the supreme court, made in a special proceeding, is controlled by the statute relating to the special proceeding in question, which declares that the order confirming the report shall be final and conclusive, I am entirely unable to see how it is that the same declaration in respect to the effect of the same order does not equally control the operation of the act of 1854, providing for an appeal to the general term from an order of the special term in a special proceeding.

Again: the commissioners are required to make their report to the supreme court. That has been done. The court, upon the coming in of the report, is required to hear any matter that may be alleged against it. That has been done. Having heard what has been alleged against it, the court is required to make an order. That has been done. The order thus made

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must be one of two things: it must confirm what has been done by the commissioners, or it must return the report for reconsideration. The former has been done in this case; and that being done, the statute declares that it is final and conclusive. Now, suppose this court, in general term, to hold that the order thus made in conformity with the provisions of the statute is not, what the statute declares it shall be, final and conclusive, and that it will entertain the appeal, upon what principle shall the review be had? We have seen that it is the duty of the court, upon the coming in of the report, to hear what can be alleged against it, whether it be in respect to matters of fact or law; and if, upon the whole, it appears that no substantial injustice has been done, to confirm the report. The very nature of this hearing, involving as it does the exercise of judicial discretion, and little if anything else, is opposed to our very first notions of a review upon appeal. There is no more familiar rule than that an appeal will not lie from an order which the court was authorized to make, or not, in its own discretion.

"It would be repugnant to our notions of the plan of our judiciary system," says Judge PARKER, in delivering the opinion of the court of appeals in the matter of the *New-York Central Railroad Company agt. Marvin*, (1 Kern. 276,) "to suppose that it was intended that the questions of fact, almost always involved in appeals from appraisals of damages in railroad cases and other like proceedings, were designed to be brought up for adjudication to the court of last resort." The remark may be applied with equal force to an appeal from the special to the general term.

"The whole proceeding," says the same learned judge, "is a special creation of the statute, and seems designed to form a complete system of itself, entirely independent of the general provisions of law relating to appeals." So, in this case, I am of opinion that the general provisions of the act of 1854, authorizing an appeal from an order of a special term in a special proceeding, as well as the provision of the eleventh section of the Code, authorizing a review upon appeal to the court of

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appeals, of an order of this court, made at general term, in a special proceeding, have no application whatever to the special statutory proceeding in question, and that the motion to dismiss the appeal should therefore be granted.

PEABODY, Justice. Where jurisdiction is conferred on a court in a class of cases or proceedings, there is no doubt that, ordinarily, it would have power to hear and determine the matters, in the manner in which the jurisdiction of the court was usually exercised, and in all ways and manners in which it was usually exercised, whether in its original cognizance or appellate hearing; and its power over the matter would only be terminated when all the modes of hearing and trying causes usual in such cases were used, and all the powers of appeal and review therein were exhausted. This would be the effect of a legislative act conferring jurisdiction in a particular class of cases, not previously cognizable in that tribunal.

The mode of availing of the jurisdiction would depend on the general internal regulations of the tribunal in cases similar in their nature; and jurisdiction having been conferred, the class of suits or proceedings would be entitled to all the powers of the court, and to be tried and re-tried in the original and appellate branches of the court, according to the practice of the court, as it existed at the time in other cases in which it had previously exercised jurisdiction: and, *prima facie*, this court, having jurisdiction in this class of cases conferred on it, would exercise it to the same extent, and in the same mode and variety of modes, in which it exercised its jurisdiction in other cases; and the suitor, thus transferred here, would have a right to exhaust the powers of the court, by applying them in the last form of appeal recognized therein.

This would ordinarily be the case in the description of cases like the present, if the statute giving the jurisdiction had been general in its terms, or had simply said that the decision of the court herein should be final and conclusive; but in the case before us, the statute, when it says, "that the order or judgment of the court in the premises, shall be final and conclusive," is

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evidently speaking of the original order or decision of the court in the premises, in the first instance, on the motion for confirmation, and not of that one, the last order the court would ordinarily have power to make, and when its powers, in their own nature, would, with that final effort, be exhausted and spent.

It is not easy to say what meaning or effect this part of the statute is to have, unless it means as suggested: for to say that an order, or a judgment in a case, shall be final and conclusive, meaning some order or some judgment, and not any particular one, shall be so, is to say what scarcely has any practical meaning. Without any such provision, some order or judgment must be final and conclusive, in the nature of things.

The last order must be the final one; and it would be unnecessary to say of the order of the court, made in the branch or department of last resort, and which must, in the nature and constitution of the court, be final there, that it should be final, especially when there was no other tribunal entertaining an appellate jurisdiction. Such an order must, in the nature of things, be final—final as to the court in which it is made, and final as to the litigation, there being no appellate tribunal.

To give effect to this part of the statute, therefore, it must be interpreted to declare that the order or judgment, not necessarily in the nature of things, and without such provision, final is, by virtue of it, declared, pronounced to be, and is made so.

But it is said that the statute of 1854 expressly authorizes appeals, to the general term, from any judgment, order, or final determination, made at a special term, in any special proceeding. This is substantially the language of the statute, and these proceedings may be included in the term "special proceedings." But this statute is general in its language and application, and embraces all special proceedings in general terms. It is general, and not specific. It does not specify cases of this kind, although its language is broad enough to, and does in terms, include them. But the statute, which declares that the judgment, or order of confirmation, shall be final and conclusive, is specific, and applies only to this one par-

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ticular class of proceedings; and the well-known rule of construction in such cases, is to give full effect to the particular, specific, or exceptional enactment, and consider the general one, modified by, and to the extent of it. The one is the general rule, the other the exception.

The decision in the court of appeals, in the case of Canal-street, seems to proceed very much on this ground; and the language in the two statutes is so similar as to make that decision almost authoritative on us in the construction of this one, and it certainly should have great weight with us in determining the effect to be given to it in the case in question.

Besides this, there is much in the very nature of the jurisdiction here exercised to lead to the conclusion, that no appeal was intended, or is expedient; the general guardianlike care and authority which the court exercises, as if superintending for the general good, the interests of the corporation, and of individuals, its wards, to see that the burthens are equally distributed, and the benefits equally bestowed in a general manner, and, on the whole, is not of that definite character controlled and measured by the exact rules of law, which seems to render it desirable that it should be the subject of an appeal, or susceptible of review, according to the ordinary acceptation on that subject; for it is so eminently matter of discretion that two minds could hardly be expected to agree entirely on all the details, large and small, of such a measure.

This view would not control or override the plain language of the statutes; but where that is doubtful or indecisive, the nature of the subject-matter may very well be considered in seeking light as to the intent, meaning, and legal effect of the enactment.

The motion to dismiss the appeal must, I think, be granted.

CLERKE, Justice—*dissenting*. Formerly, and until a period comparatively recent, in all the superior courts of law, both in England and in this, and most of the sister states, there was only one branch of jurisdiction in each court. All proceedings were had, or were supposed to be had, and all decisions were

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made, before the full court *in banc*. It was not, perhaps, essential to the validity of the proceedings, that any particular number of judges should have attended, although, I believe, in the queen's bench, four generally, and never less than two, attended, and in the old supreme court of this state, three, almost invariably, composed the full bench; and I was not aware, until yesterday, that it was ever composed of only one judge. Whether, however, composed of one or three judges, its decisions were final, as far as the supreme court was concerned; and the parties had *no right* to question them, except by writ of error to the court for the correction of errors. The only deviation from this course, before the adoption of the present constitution, was in the establishment of special terms, in 1830, for the purpose of hearing and deciding, during the vacations intervening between the calendar terms, all non-enumerated business, except such as the court should direct to be heard in term.

The present constitution recognizes the distinction between special and general terms; and the blending, I may say, fusion, of equity and common-law jurisdiction, together with considerations of convenience and improvement, induced the legislature, both by the judiciary act of 1847, and by the Code expressly, to establish a special term, as a distinct but inferior branch of the court, in which, generally, judgments were to be rendered, and orders made, in the first instance, by a single judge, and from which an appeal would lie to the general term to consist of not fewer than three judges; so that the general term, at least practically, for most purposes, is chiefly an appellate branch of the court.

In all actions, and now by a late statute, in *all* special proceedings, an appeal is allowed from the special term to the general term, from every judgment and every order affecting a substantial right. This right adheres to all cases, except where the law expressly provides the contrary. Unless, therefore, there is some provision, having particular reference to proceedings relating to the opening and laying out of streets, denying

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this right, an appeal lies, in such cases, from an order of the special term to the general term.

It is maintained, that this exception is contained in the act of 1818. This act says, that "the report" of the commissioners, "when *confirmed* by the court, shall be final and conclusive," &c.; and it is urged because the order of the special term confirms the report, and because the special term is "*the court*," that the order of the special term in this case is final and conclusive, and that the superior or appellate branch of the court cannot entertain any application to disturb it.

Undoubtedly, the special term is the court, though not the whole court—not the court in the total and ultimate exercise of its power. The decisions of the special term, when acquiesced in, are as final and as effectual as those of the general term; but it is assuming the very question at issue, to suppose those decisions to be final in cases like the present. They are final, indeed, if they are not appealable; and they are not appealable, if they are final.

According to the decision of the court of appeals, in the Canal and Walker-street case, the language of the act of 1813 imports, that there shall be no appeal from the decision of the supreme court to the former court; but I cannot discover anything in the opinion of Judge GARDINER, which goes any further. In this species of special proceedings, when the supreme court confirms the report of the commissioners, there can be no appeal to the court of appeals; because the act declares that the report, in such case, "shall be final and conclusive."

But is the report *confirmed* by the supreme court, according to the true intent and meaning of the act, or even according to the popular signification of the word, when the order of the special term is appealed from, and before the general term has taken action on such appeal. Until that is done, the order of the special term is in suspense. It would, I think, be a strained construction of the language of the act of 1818, to consider that it forbids the supreme court itself to review its own decision; that it forbids that an order made by a court held by a single judge, shall not be questioned or reconsidered by that judge

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himself, or by his brethren holding a general term; and that it imports that cases of this description shall be exempt from that redeliberation, and more solemn consideration, to which judgments and orders in other cases are subject.

This right of review is a necessary and inherent power in every court, except when it is expressly denied by statute in positive and unqualified terms. All judgments and orders of a special term, when appealed from, are in abeyance, as it were, until disposed of by the general term; and, although they may be termed "judgments or orders of the court," they are not operative until their final disposition; then, and only then, they become complete; and it is this complete action of the court, when the litigants require it, that makes the confirmation a final and conclusive adjudication.

Neither, until this occurs, does the right of the corporation to the land, or the owners to damages, accrue.

I am, therefore, of opinion, that the application to dismiss the appeal should be denied.

COURT OF APPEALS

WILLIAM A. PORTER agt. RICHARD F. CLARK and JOHN L. WILLIAMS.

An *assignment*, made for the benefit of creditors, which authorizes the assignee to sell the assigned property *on credit*, is *fraudulent* and *void* as against the creditors of the assignor. (*See Nicholson agt. Leavitt, 2 Seld. 510.*)

After the assignee has taken possession of the assigned property, a *supplementary assignment*, or *direction* of the assignor to the assignee that it was intended to have the property sold for *cash only*, and authorizing and directing the assignee to sell it for *cash only*—not *on credit*—does not help the matter, or cure the difficulty at all; because, the original assignment, as between the parties, *vests the title* of the property in the *assignee*, and the assignor has not the power to modify or change the terms of the transfer in any respect; and certainly not to the prejudice of a creditor whose lien on the property had attached, by the institution of supplementary proceedings under the Code.

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Under the Code, a *receiver*, appointed by a judge in the course of proceedings supplementary to an execution, can maintain an action to recover property, *real* and personal, which the judgment-debtor has transferred to the defendant by a conveyance—good as between the parties to it, but void as to creditors, on account of fraud. (*See Chautauque County Bank agt. White*, 2 *Selden*, 236, where the same principle is applied to the powers of a receiver appointed previous to the Code.)

DENIO, J., dissenting, as to applying the principle to *real* estate—*holding*, that to allow a receiver to recover and sell the real estate of the debtor, under these proceedings, would subvert the system so carefully devised for the application of that species of property to the payment of debts—that is, by creating a *lien* taking date at the docket of the judgment, enforcing that lien by a sale on execution, and then instituting an auction for fifteen months among such creditors as before the expiration of that time shall have acquired like liens upon the same land. Creditors' bills, before the Code, did not change this method of applying real estate to the payment of debts. If the receiver could sell real estate under these proceedings, it would cut off all right of *redemption* to the creditors, and to the debtor and his heirs and assigns.

September Term, 1858.

DEMURRER.—This action was brought by the plaintiff, as receiver, to set aside an assignment executed by the defendant Williams, to the defendant Clark. The assignment was made on the 5th of January, 1850. It embraces all the property and effects of the assignor, except such articles as are by law exempt from levy and sale. It is made for the benefit of creditors, giving preferences. The assignee is authorized, by the terms of the assignment, to sell and dispose of the property assigned, either at public or private sale, to such person or persons, at such price or prices, and on such terms and conditions, *and either for cash or credit*, as in his judgment may appear best, and most for the interest of the parties concerned, and to convert the same into money, and to collect the debts, &c. On the 27th of February, 1850, the Dutchess County Iron Company recovered a judgment against Williams for \$508.32 upon a debt contracted before the assignment. Upon which judgment an execution was issued, on the 28th of February, to the sheriff of the proper county, and returned unsatisfied.

On the 28th of March, 1850, an order was made by one of the justices of the supreme court, pursuant to the provisions of the Code relating to proceedings supplementary to execution,

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requiring the judgment-debtor to appear and answer before a referee, appointed for that purpose, on the 30th of the same month. On the 4th of April following, the *same* judge made an order appointing the plaintiff a receiver of the property of the judgment-debtor, and also, by order, forbade a transfer or other disposition of the property of the judgment-debtor, not exempt from execution, or any interference therewith.

On the 30th of March, 1850, Williams executed and delivered to Clark an instrument, whereby, after reciting that doubts had arisen whether, by the assignment of the 5th of January, the assignee had the power to sell the property assigned *on credit*, and that it was intended to have it sold for *cash* only, the assignee was authorized and directed to sell the property for cash only. No assignment was ever executed by the judgment-debtor to the receiver.

It is admitted, that immediately upon the execution of the assignment, the assignee took possession of the assigned property. That he had, in fact, sold only for cash; and that he had applied a part of the moneys received by him, as assignee, to the payment of the preferred debts.

On the 11th of April, 1850, another execution was issued upon the judgment, to the sheriff of Columbia, *and* Samuel Bryan, who owed the judgment-debtor \$191.50, at the time of the assignment, paid the debt to the sheriff, to apply upon the execution. The assignee claims that he is entitled to receive this debt under the assignment. The cause was heard upon the pleadings. Some of the facts above stated do not appear in the pleadings, but were admitted by the counsel upon the argument.

The court below held the assignment void on account of the provision authorizing the assignee to sell on credit; that the supplementary paper did not aid it; and that the suit was well brought in the name of the receiver. It then made special provisions for applying the assigned property, real and personal, to the payment of the plaintiff's judgment.

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MARTIN PECHTEL, for appellants.
JOHN H. REYNOLDS, for respondent.

DENIO, Judge. 1. Whatever doubt may formerly have existed, it is now settled by this court that the provision in the assignment authorizing the trustee to sell the assigned property on credit, renders the transfer fraudulent and void, as against the creditors of the assignors. (*M. S. Court of Appeals, October Term, 1852, Nicholson agt. Leavitt. See 2 Seld. 510.*)

2. The instrument executed on the 30th day of March, 1850, was wholly without effect to change the legal character of the assignment. As between the assignor and assignee, that instrument had vested the title to the property in the latter. Whether both parties to the assignment could, by one or more proper instruments, executed by the assignee as well as the assignor, have reformed the former instrument in the particular in which it is objected to, is a point upon which it is unnecessary to express an opinion. But certainly the assignor who had parted with all his estate in the property, could not alone modify or change the terms of the transfer in any respect. The supplementary paper was only a direction by the debtor to his assignee not to make use of a power expressly given in the instrument of transfer. This he might obey or disregard according to his pleasure.

3. Whether a receiver, appointed by a judge in the course of proceedings supplementary to an execution, can maintain an action to recover property which the judgment-debtor had transferred to the defendant by a conveyance, good as between the parties to it, but void as to creditors on account of fraud, is a more important question. Believing that there is a difference between real and personal estate in this respect, I will first examine the question as to the latter species of property. By the practice of courts of equity, receivers are officers of the court, appointed to take care of property in its hands belonging to its suitors. They have no estate in the property which will enable them to sustain an action respecting it, before it is delivered to them, unless, indeed, the title has been assigned to them.

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To accomplish the purposes of justice, the courts have compelled transfers to be executed in their favor, and have authorized them to sue in the name of the party in whom the legal interest resided. This was the state of the law, independent of legislative provision.

By an act passed in 1845, receivers were authorized "to sue in their own names for any debt, claim, or *demand* transferred to them, or to the possession and control of which they were entitled as such receivers." (*Laws 1845*, p. 90.) This statute would authorize the plaintiff to prosecute, in his own name, any of the debtors of Williams, but is scarcely broad enough to warrant a suit to compel the specific delivery to him of chattels belonging to Clark. It is sufficiently comprehensive to allow a recovery in the name of the receiver for a demand arising upon tort. (*Gillett agt. Fairchild*, 4 *Denio*, 80; *Hudson agt. Platt*, 11 *Paige*, 183.)

By the 299th section of the Code, which is a part of the chapter relating to proceedings supplementary to the execution, it is declared, "that if it appear that a person or corporation, alleged to have property of the judgment-debtor, or indebted to him, *claims an interest in the property adverse to him*, or denies the debt, such *interest*, or debt, shall be recoverable *only* in an action against such person or corporation by the receiver; but the judge may, by order, forbid a transfer, or other disposition of such property, or interest, till a sufficient opportunity be given to the receiver to commence the action, and prosecute the same to judgment and execution."

By § 244 of the Code, a receiver may be appointed after judgment, among other things, "to carry the judgment into effect;" and the receiver under these provisions, supplementary, &c., is a receiver of the property of the judgment-debtor. (§ 298.)

The judgment against Williams, in the original suit, entitled the plaintiff therein to process of execution against the property of the former, under which the personal effects might be immediately sold to raise the money adjudged to be due. Such process in this case had proved fruitless. The object of the

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receiver, under these proceedings, is to carry the judgment into effect; and for that purpose § 297 provides that the judge may order "any property of the judgment-debtor, not exempt from execution, in the hands either of himself or any other person, or due to the judgment-debtor, to be applied towards the satisfaction of the judgment."

After that follows § 299, before quoted, providing for a suit by the receiver, where there is an adverse claim to the property, or a denial of the debt, if the subject is a chose in action. The sense of all the provisions connected with the act of 1845, is that as to chattels and choses in action which the debtor confessedly owns, the receiver is to take them into his possession; but when there is another claimant, not a party to the proceeding, his rights are not to be determined in a summary way by the judge, but the receiver is to bring an action. In this case, Clark, the assignee, had in his possession chattels and choses in action, which had belonged to Williams: but the title to which Clark claimed to have acquired by means of the assignment. The receiver, acting for the creditor, insisted that the assignment was void. In my opinion, this presented the precise case contemplated by § 299 of a claim of an interest in property adverse to the debtor. This action was brought to recover such interest—that is, to recover the property. As it was directed to be brought by the receiver, it ought, of course, to be brought in his name, there being no intimation in the statute that it should be brought in the name of any other person.

But it is argued, that the defendant Clark, having a conveyance from Williams, the plaintiff, who, it is argued, represents Williams, cannot recover, because Williams himself would have been estopped by the conveyance, which was valid as to him. This is an incorrect view of the case. The plaintiff, as receiver, and an officer of the court, represents the rights of the creditor; and when the question, whether the property which passed by the assignment belongs to the debtor or the assignee, is presented, it is precisely the same issue which is involved when an action is brought by a party claiming to recover against a

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sheriff, property which has been seized on execution. The inquiry is, whose property is it, *quoad* creditors and their legal remedies. The receiver stands in the same relation which the sheriff occupies in that class of controversies.

When the court below pronounced that the assignment was fraudulent and void as to creditors, it declared, in effect, that the receiver, as the officer of the court and of the law, appointed to administer the debtor's effects, which were subject to the remedies of his creditors, was entitled to the property.

I do not find that this question has ever been decided, though there are *dicta* on both sides. In *Hyde* agt. *Lynde*, (4 *Comst.* 387,) BRONSON, J., expressed the opinion that the receiver of the effects of a grantor could not impeach the conveyance on the ground of fraud against creditors. He, however, said it was not necessary to decide that question, as there was no proof in the case then before the court, that the transaction sought to be avoided was a fraud against any one.

In *Gouverneur* agt. *Warner*, (1 *Sand. Sup. C. Rep.* 624,) the court declared, that a receiver in a creditor's suit might set aside a fraudulent transfer by the debtor, though the remark was not perhaps necessary to the decision of the question then before the court. There are a great many cases in the books where receivers have been permitted to question, and have succeeded in setting aside conveyances, where the parties whose property they were administering could not have been heard to impugn the transaction. (*Leavitt* agt. *Palmer*, 3 *Com.* 19; *Gillet* agt. *Moody*, *id.* 479, and *Brower* agt. *Hill*, 1 *Sand. S. C. R.* 629, are cases of that kind.) It is true, that the objection to the transfers was not solely that they were fraudulent against creditors, but that they were illegal under a statute. Still they were cases where the assignors could not have maintained an action grounded on an allegation of their illegality. They would have been met by the maxim, *in pari delicto potior est conditio defendantis.* (*M'Colum* agt. *Gourlay*, 8 *John.* 147.)

But I think the right of a receiver, appointed at the instance of a creditor, to maintain an action in disaffirmance of a title fraudulently created by the debtor, is well-founded upon gen-

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eral principles of law. The law declares such titles fraudulent as against creditors, but valid as between the parties to the conveyance. But creditors have seldom, if ever, a right with their own hands to take their debtors' property to satisfy their debts; they can do it only through such instrumentalities as the law has provided for the purpose; where the debtor has tangible property, the creditor acts by the sheriff through the ordinary process of execution. Where the property is of an equitable character, or, being chattels, is concealed, or fraudulently conveyed, a creditor's bill, under the former practice, or an order after execution under the Code, is the means which the law has provided for obtaining satisfaction of the judgment. If, in either case, a conveyance from the debtor is set up against the remedy, and it is proved to be fraudulent, it forms no impediment to the course of justice, but is declared void, and removed out of the way.

In principle, it is quite immaterial what particular form of remedy the creditor is making use of. It is enough that it is one which the law has furnished, and that it is adapted to his case. If the conveyance is void as to creditors, it forms no obstacle to the enforcement of any remedy.

4. If the proceeding, adopted by the creditor in this case, was one which affected the real estate of the debtor, and provided for its application towards the debt, the preceding remarks would dispose of that subject also. But I am of the opinion that such is not the case. The method provided by law for subjecting the debtor's lands to the payment of his debts, is by creating a lien taking date at the docket of the judgment, enforcing that lien by a sale on execution, and then instituting an auction for fifteen months among such creditors as, before the expiration of that time, shall have acquired like liens upon the same land. The proceedings by creditor's bill before the Code, did not change this method of applying real estate to the payment of debts. It was limited to a decree of satisfaction out of "the personal property, money, or things in action belonging to the defendant." (2 R. S. 174, § 89.)

A bill could be sustained to remove a fraudulent obstruction

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to the remedy against the real estate; but this was a suit of a different character, and did not require an execution to be returned unsatisfied. (*M'Elwain agt. Willis*, 9 Wend. 548; *Brinekerhoff agt. Brown*, 4 J. C. R. 671.)

The proceeding provided by the Code, by an order after execution, is not framed to remove impediments to an execution against real estate. It does not authorize a judgment affecting any adverse claimant, nor does it provide for a suit by a receiver, except as to property which he would have a right to take into possession, and administer, if there was no hostile claim. To allow a receiver to sell the real estate of the debtor under these proceedings, would subvert the system so carefully devised for the application of that species of property to the payment of debts. If he could sell real estate, it would cut off all right of redemption by other creditors, and deprive the debtor and his heirs and assigns of the privilege of redeeming, secured to them by the statute referred to. (See *The Chautauque County Bank agt. White*, 6 Barb. S. C. R., and cases referred to; reversed, 2 Seld. 236.)

Assuming that the receiver has no authority to sell the real estate of the debtor, there could be no propriety in allowing him to maintain an action to remove an impediment created by a fraudulent conveyance of it. If any one can sustain such an action, it is the creditor; but as bills for discovery are abolished, (Code, § 389,) it is not easy to suggest an adequate motive for such an action. The creditor may cause the land to be sold on his execution, and rely on being able to show the conveyance by the debtor to be fraudulent; and perhaps he may still maintain an action to have the conveyance declared void, notwithstanding he is deprived of a discovery by answer, on the ground that a beneficial sale by the sheriff cannot be had until the obstruction is removed. He can examine the parties, as witnesses, at the trial, either in an action to remove the obstruction, or in an ejectment after the sale, and in this way have the advantage formerly obtained by an answer to a bill of discovery. In this case, the evidence of the fraud being contained in the written transfer, and the question being one of law, and now

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well-settled in this court, the creditor cannot be embarrassed as to his remedy.

The judgment of the court below is in accordance with these views, except that the general expressions by which the defendant, Clark, is required to assign and deliver to the plaintiff *all the property* in his possession, or under his control under the assignment, probably embraced the real estate. It must, therefore, be modified, by inserting the word *personal* before the word *property*, where required to make it correspond with the opinion which has been expressed.

WILLARD, Judge. I. The first question is, whether a receiver, appointed by a justice of the supreme court, under supplementary proceedings, instituted by a judgment-creditor upon the return of executions unsatisfied, in pursuance of the provisions of the Code of 1849, §§ 292-298, can, after perfecting his appointment, maintain an action in his own name, to set aside an assignment of real and personal property, made by the judgment-debtor, on the ground of fraud, without having first received from such debtor an assignment to himself as such receiver?

By § 298 of the Code of 1849, the receiver appointed under supplementary proceedings, possesses the like authority as if the appointment were made by the court, according to § 244.

By § 244, the courts are authorized to appoint receivers, and grant the other provisional remedies, according to the then present practice.

The act of April 28th, 1845, (*L. p. 90, 91,*) enacts, that any receiver, appointed by virtue of an order or decree of the court of chancery, may take and hold real estate upon such trusts, and for such purposes, as the court may direct, subject to the further order or direction of the court; and the second section empowers receivers, &c., appointed by an order or decree of the court of chancery, to sue in their own name for any debt, claim, or demand, transferred to them, or to the possession or control of which they are entitled as such receiver.

The CHANCELLOR, in *Wilson agt. Wilson*, (1 Barb. Ch. R. 594,) thought the act of 1845 was not broad enough to transfer

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the title of real estate to the receiver, by the mere order of the court, and without an actual conveyance from the party to the suit in whom such legal title was vested. But I think that since the Code, no such conveyance is necessary to vest the title in the receiver; and that real and personal property are, in this respect, placed upon the same footing. The sections before cited provide for the appointment of receivers of the property of the judgment-debtor, &c.

Section 464 enacts that the term "property," as used in the Code, shall include "property real and personal;" and §§ 462 and 463 define what is meant by "real property," and by "personal property." The first is declared to be co-extensive with lands, tenements and hereditaments, and the other to include money, goods, chattels, things in action, and evidences of debt.

Before the Code, it was settled that the order appointing a receiver, when the appointment was completed, vested in him all the property and effects of the debtor subject to the order, without an assignment. (*Mann agt. Pentz*, 2 Sand. Ch. R. 257; *Wilson agt. Allen*, 6 Barb. S. C. R. 542.) Those cases speak only of personal property, and doubtless the real property did not, before the Code, pass by such order, and was only directed to be conveyed under peculiar circumstances. (*Scouton agt. Bender*, 3 How. Sp. T. R. 185; 6 Barb. S. C. R. 602, *per Harris*, J.) But since the Code, I think, the order has the like effect upon the debtor's real estate, as upon his personal estate, and that the whole, by form of the order, becomes vested in the receiver when the appointment is completed. The language of the Code effectually removes the difficulty which the CHANCELLOR suggested in *Wilson agt. Wilson, supra*. It puts real and personal property in the same category.

The statute of frauds affords no objection to this view. It is there enacted, (2 R. S. 134, § 6,) that no estate, or interest in lands, &c., shall hereafter be created, granted, assigned, surrendered, or declared, unless by *act or operation of law*, or by deed or conveyance in writing, subscribed by the party, &c., or by his agent, &c. It was competent for the legislature to re-

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move that impediment to conveyances, or to declare what act or operation of law should work a transfer of title. They seem to have done so by giving a legislative definition to the word "property," so as to embrace real as well as personal property.

II. The receiver, appointed under supplementary proceedings, does not stand merely in the place of the debtor, but represents the creditors, and can thus impeach the fraudulent sales of the debtor.

The assignment sought to be set aside, in this case, was good between the parties. The fraudulent grantor could not impeach his own grant. (*Osborn* agt. *Moss*, 7 J. R. 161; *Jackson* agt. *Gurnsey*, 16 J. R. 189; *Jackson* agt. *Cadwell*, 1 *Cowen*, 622; *Leah* agt. *Kelsey*, 7 *Barb. S. C. R.* 466; *Jewett* agt. *Palmer*, 7 J. R. 65; *Padgett* agt. *Lawrence*, 10 *Paige*, 170; *Dermott* agt. *Stanley*, 3 *Barb. Ch. R.* 403.)

But the receiver, succeeding to the right of the debtor, represents other interests than those of the debtor. He comes in by the act of the law, and not by the act of the party. Before the Revised Statutes it was held, in *Osborn* agt. *Moss*, (7 J. R. 161,) that the personal representatives of the fraudulent grantor could not invalidate the grant; and the reason was, that the statute renders the sale void only as against creditors and purchasers, and leaves it valid between the parties and their representatives. But now, as remarked by *SAVAGE*, Ch. J., in *Dox* agt. *Burkinstone*, (12 *Wend.* 543,) under our statute, executors and administrators have a new character, and stand in a different relation from what they formerly did, to the creditors of the deceased persons with whose estates they are entrusted. They are not now the mere representatives of their testator or intestate. They are constituted trustees, and the property in their hands is a fund to be disposed of in the best manner for the benefit of creditors. (See 2 R. S. 87, § 8; *id.* 449, § 17, &c.) The same doctrine was affirmed in *Babcock* agt. *Booth*, (2 *Hill*, 181,) and was approved by the CHANCELLOR in *Brownell* agt. *Curtiss*, (10 *Paige*, 210-218.) Since executors and administrators have come to represent the rights of the creditors gen-

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erally, they have been allowed to impeach the conveyances of their testator or intestate, when fraudulent against creditors.

Upon the same principle, the receiver of an insolvent corporation is allowed to question the fraudulent and illegal acts of the corporation. He represents both the creditors and stockholders. (*Gillett* agt. *Moody*, 3 Com. 476; *Leavitt* agt. *Palmer*, *id.* 19; *Brown* agt. *Hill*, 1 Sand. Sup. Court R. 629; *Hyde* agt. *Lynch*, 4 Com. 392.)

The receiver is bound by the legal acts of the corporation. It is only those which are illegal that he can impeach. The receiver appointed under the Code represents the interests of the creditors, as well as of the debtor. He is a trustee for all parties, and is bound to apply the effects of the debtor, faithfully to the payment of the debts, according to their legal or equitable priorities; and if anything remains, to restore it to the debtor or his grantee. He has no power to set aside legal and valid acts of the debtor; but such as are illegal and forbidden by law he can successfully assail. These principles are legitimate deductions from the cases which have been cited. And they are carried out to their consequences in the Code of 1851, (§ 298,) which forbids the appointment of more than one receiver of the same judgment-debtor, though there may be separate proceedings in favor of different creditors. It shows that the receiver is a trustee for all.

The act which the receiver seeks to avoid in this case, was an illegal act of the debtor. The object of this action is to set aside an assignment made by the debtor, as is alleged, with intent to defraud the creditor under whose judgment and execution the plaintiff was appointed receiver, and the other creditors of the assignor. Such conveyance was void at common law, and is expressly forbidden by the statute. (2 R. S. 137, § 1.) It is void as against the creditors of the party making it, though good as between him and his grantee. The plaintiff representing the interest of the creditors, has a right to invoke the aid of the court to set aside the assignment. He stands, in this respect, in the same condition as the receiver of an insolvent corporation, or as an executor or administrator, and, like

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them, can assail the illegal and fraudulent acts of the debtor whose estate he is appointed to administer.

These views are greatly strengthened by the recent decision of the court of appeals in the case of *The Chautauque County Bank agt. White*. The supreme court in the third district (see 6 *Barbour*, 589) held, in that case, among other things, that a receiver in a creditor's suit could not take such a title in the real estate of the judgment-debtor, even under an assignment made by the latter in pursuance of an order of the court, as to authorize the court to direct him to sell such real estate, and apply the proceeds to the payment of the creditors having liens thereon; nor so to divest the judgment-debtor of his title to the real estate as to prevent a judgment, subsequently recovered against him, from becoming a lien thereon. The court of appeals held the contrary on both these points. (*The Chautauque County Bank agt. White*, 2 *Seld.* 236.)

According to the decision of the supreme court, the real estate still remained in the debtor, notwithstanding the order appointing a receiver, and notwithstanding an actual conveyance by the debtor to the receiver, in pursuance of the order of the court. This judgment was reversed. The order appointing a receiver in that case was made before the Code. The case is therefore in point, to show that, under the old practice, the title passed to the receiver under an assignment, made in pursuance of an order of the court. The argument in favor of its passing since the Code is much stronger than it was before.

III. The assignment in this case was made by the defendant Williams to the defendant Clark on the 5th of January, 1850, in trust, for the payment of the debts of the assignor, according to an order of preference therein specified. It embraced all the real and personal property of the assignor; and it authorized the assignee "to sell and dispose of the same, either at public or private sale, to such person or persons, for such price or prices, and on such terms and conditions, and either for cash or for credit, as in the judgment of the assignee may appear best," &c.

In *Barney agt. Griffin*, (2 *Com.* 365,) BRONSON, J., in giving

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the opinion of the court, said, that an assignment by an insolvent debtor, of his estate, is fraudulent and void, when, by the terms of the deed, the trustees are authorized to sell the property on credit. It does not appear by the report that the whole court acquiesced in that decision; and there were other grounds taken by the learned judge, and appearing on the face of that assignment, rendering it void, and upon which the other members of the court may have acted.

This has led the superior court of New-York to question the *dictum* of BRONSON, J. (See 4 *Sand. Sup. Co. R.* 293.) But I understand this court, in a subsequent case, affirmed the principle above stated by BRONSON, and that it is no longer an open question by this court. (See *Nicholson* agt. *Leavitt*, 2 *Seld.* 510.)

The assignment must, therefore, be set aside, unless the subsequent assignment, made by the assignor on the 30th of March, 1850, cured the defect.

IV. The subsequent assignment was made after the rights of the creditor had attached, and recited the assignment of the 5th of January; and that doubts had arisen, whether the authority to sell on credit did not vitiate the assignment, and proceeded to direct that the sale should be for cash only. It is believed that the assignor had divested himself of all control over the property by the assignment of the 5th of January; and that he could neither revoke nor alter it—and certainly not to the prejudice of a creditor whose lien on the property had attached by the institution of supplementary proceedings under the Code.

The judgment of the supreme court must be affirmed.

NOTE.—The decision of the court was in accordance with the opinion of Judge WILLARD, the court being governed on the 4th point discussed by Judge DENIO, by the case of *The Chautauque County Bank* agt. *White*,—since reported in 2 *Seld.* 236.

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SUPREME COURT.

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Where the circuit judge left it to the jury to say whether the *sale* (of goods on execution, issued upon a judgment on confession) was in *good faith*, and not to hinder or delay creditors; and it was urged, on a general exception to the charge of the judge, that he should have said to the jury, "not to hinder, delay, or *defraud* creditors,"

Held, that if the sale was made in good faith, it could not have been to *defraud creditors*. Besides, the exception taken on the trial was too indefinite; it should have specified distinctly that the judge was requested, and refused so to charge.

Where it was urged that the sale was fraudulent, because the property was put up in but few parcels, and it appeared that the sheriff exercised his own judgment in that respect, and there did not appear to be any collusion between the plaintiff and defendant in the execution as to the manner of sale,

Held, that if the defendant caused the sale to be conducted fraudulently, the plaintiff in the execution should not be held responsible for it. They are adverse parties, and one cannot be affected by the fraud of the other, if he takes no part in it.

New-York General Term, Jan., 1855.

Before MITCHELL, ROOSEVELT and CLERKE, Justices.

THIS is an action of replevin, brought against the defendant, for taking goods alleged to belong to the plaintiff, from the possession of one Flandrow.

In November, 1842, Wyman recovered a judgment against Flandrow by confession, on bond and warrant of attorney. In December following, an execution was issued, and the entire contents of a thread and needle store of Flandrow's was levied on. In January the goods were sold; they were bought in by Wyman's agent, for \$395; their original cost was over \$1,000. In May following, Flandrow removed to Grand-street; hired a store in his own name, and put up his signs with the word *agent* on them, in very small letters where the painter usually puts his name.

In November, 1848, Martha Durando recovered a judgment

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against Flandrow, and issued execution; and in December following, Mr. Hart, the sheriff, levied on the property in Flandrow's store, about one-half of which was the same as that previously sold to Wyman, at the Bowery store. Wyman then brought this suit in replevin; and verdict was rendered for him, the jury assessing the value of the property at \$700. The defendant appealed upon exceptions to the ruling of the court,

CHARLES A. PEABODY, for plaintiff.

HORTON H. BURLOCK, for defendant.

MITCHELL, Justice. The defendant having levied on goods which once belonged to Flandrow, and had been previously sold under execution to the plaintiff, defended himself in an action for taking the goods, on the ground that the sale to the plaintiff was fraudulent.

The defendant, without objection, allowed Brigham to testify that Wyman had called on him, and requested him to sell goods, and that Flandrow would call and pick them out; and then, on cross-examination, brought out also what Wyman said when the credit expired on the sale, viz., that Flandrow was to pay out of the store. The judge then asked what Wyman said when he called on the witness at the time above stated, and the witness answered, that Wyman said he had assumed the business of the store to secure himself for liability incurred in settling Flandrow's debts. The defendant excepted to this last question. It may be that it was admissible to explain the previous testimony which was not objected to, and as to which there was a cross-examination; but, whether admissible or not, the defendant himself proved nearly the same facts by another witness, W. A. Douglass, who says that "Wyman said that Flandrow was his agent, and that he (Wyman) had purchased the property to help Flandrow along; and that Flandrow was to receive a certain amount for his trouble."

The exception, therefore, should not be sustained. The judge left to the jury the question, whether the sale was in *good faith*, and not to hinder or delay creditors; and the de-

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fendant excepts to this, that the judge should have said, not to hinder, delay, or *defraud* creditors. If the sale was in good faith, it could not have been to *defraud* creditors ; and if it was desired that the question of *fraud* should be brought more distinctly before the jury, a general exception was too indefinite—the omission of the word “*defraud*” should have been specified.

It was urged by the defendant, that there was fraud in the sale on the execution, because the property was put up in but few parcels. It was shown that it was so put up by the sheriff of his own judgment and will ; and that Wyman did not attend the sale, but had requested Flandrow to procure Sinclair to attend the sale, and buy the goods if they went below their value, and that Sinclair did so attend.

The judge charged that Sinclair, under this authority, was the plaintiff's agent only to buy for him, and not for the purpose of directing the manner of the sale, and that Wyman was not accountable for any fraudulent act of Flandrow at the sale authorized by Wyman.

It certainly would be a dangerous doctrine to lay down, that if a defendant in an execution caused the sale to be conducted fraudulently, the plaintiff in the execution should be responsible for it. If there were evidence of connivance between the two, the one would be responsible for the acts of the other—but otherwise they are adverse parties ; and one cannot be affected by the fraud of the other, if he takes no part in it.

The authority of Sinclair was limited to buying for the plaintiff, and, as the judge correctly charged, gave him no control over the conducting of the sale.

New trial denied, with costs.

ROOSEVELT, J., on the facts as to a fraudulent sale, *dissented*.

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SUPREME COURT.

THE PEOPLE *ex rel.* MUNSON I. LOCKWOOD agt. WILLIAM W.
SCHRUGHAM.

The relator, *Munson I. Lockwood*, was duly elected Brigadier-General by the field-officers of his brigade—then comprising the county of Westchester—in 1841. He held that office, and was in the discharge of its duties, when the act of May 13, 1846, was passed. Under that act a brigade was formed including Westchester county (except one town) and the three counties on Long Island. The latter act provided that the Brigadier-General in commission and highest in rank, residing in such brigade district, should be the commanding officer of such brigade.

Under an act of May 13, 1847, the counties of Long Island were detached from the brigade then under the command of the relator, and a district was formed consisting of the militia of the counties of Westchester, Putnam, and Rockland, constituting the seventh brigade. The command of this brigade was assigned, by the commander-in-chief, in general orders, dated the 9th of June, 1847, to the relator, *Gen. Lockwood*. He continued to act in that capacity until 5th May, 1855, when the governor of the state issued a general order, revoking so much of the order of the 9th June, 1847, as assigned the command of the brigade to the relator, and directed and commissioned the defendant, *William W. Schrugham*, to the command of said brigade.

The question is, which of these gentlemen had the better title to the actual command of the seventh brigade?

By the present constitution, the provision for electing brigadier-generals by the field-officers of the brigade is continued. And the 5th section of the 11th article is in the following words: "The commissioned officers of the militia shall be commissioned by the governor; and no commissioned officer shall be removed from office, unless by the senate, on the recommendation of the governor, stating the grounds on which such removal is recommended, or by the decision of a court-martial pursuant to law. *The present officers of the militia shall hold their commissions subject to removal as before provided.*"

By the act of April 17, 1854, (tit. 2, § 5,) it is provided, that brigadier-generals shall be chosen by the field-officers of their respective brigades. The 9th section says, that whenever the office of a brigadier-general is vacant, the commander-in-chief shall issue an order for an election to fill the vacancy. The 43d section is as follows: "The commander-in-chief is hereby authorized and empowered to appoint and commission the brigade, regimental and company officers, necessary to facilitate the organization of all military districts *not now sufficiently organized to authorize an election*. All officers superseded by such appointment shall become supernumerary officers."

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Held, that the provisions in the act of 1854, as to the election or appointment of officers, were not intended to remove the *then existing officers*. The governor, therefore, was not authorized by that act, nor any other statute, to displace the relator, or to appoint the defendant.

It has never been decided that one holding an elective office shall be denuded of it, by the *enlargement of the district* which elected him, and to which his official action was confined. The universal practice has been the other way. Where an individual is the actual occupant, and claims, under possession and color of right, to hold an office, and a claim to such office, and an interference by another, is interposed, the incumbent should not be required to elect to consider himself out of the possession of the office, and then to resort to a tedious *action* to procure his restoration. A *mandamus* is the proper remedy in such a case. If the incumbent is entitled to the office, he should be *promptly* quieted in the discharge of his duties.

Westchester Special Term, Oct., 1855.

The Relator in person, and RALPH LOCKWOOD.

The Defendant in person, and JOHN THOMPSON.

S. B. STRONG, Justice. This case is before me upon an *alternative mandamus*, with several affidavits annexed to the writ, an answer, and a demurrer. The demurrer, of course, admits the facts and the direct denials contained in the answer, but not such assertions and denials as are merely inferential. The facts, as they are represented in the pleadings, are as follows:—

The relator was, in 1841, duly elected Brigadier-General of the fifteenth brigade, consisting of the militia of the county of Westchester. He received a commission from the governor shortly after his election, and thereupon entered upon the performance of the duties of the office, which he continued to discharge until the new organization of the militia, pursuant to the act of May 13, 1846.

Under that organization, the division, comprehending Westchester county, was divided into two brigades, one of which consisted of the militia of the county, with the exception of one town, and of the counties of Long Island. The relator, being the brigadier-general in commission and highest in rank, residing in the brigade-district, including the greater part of

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Westchester county, thereupon became, according to the provisions of the act of 1846,—(and whether they are valid or not will be considered hereafter,)—the commanding officer of the brigade, and the command of such brigade was formally assigned to him in general orders.

Under the act of May 18, 1847, the counties on Long Island were detached from the brigade then under the command of the relator, and a district was formed consisting of the militia of the counties of Westchester, Putnam, and Rockland, which thereupon constituted, and still continues to constitute, the seventh brigade. The command of that brigade district was assigned by the commander-in-chief, in general orders dated the 9th of June, 1847, to the relator, he being the brigadier-general residing in such district, highest in rank, who was in command on the first day of November, 1846, and who (it is to be inferred, as there is no allegation to the contrary, and the legal presumption is in favor of the action of the highest military authority in our state) had performed military duty according to the requirements of said last-mentioned act. The relator thereupon assumed the command of the seventh brigade as brigadier-general, and continued to act in that capacity until he was interrupted by the defendant.

On the 5th of May, 1855, the governor of the state issued a commission to the defendant as brigadier-general of the seventh brigade, and on the same day issued a general order, revoking so much of the order of June 9, 1847, as assigned the command of the brigade to the relator, and directed the defendant to assume the command of said brigade. The defendant, on receiving his commission, and the general order which accompanied it, took the requisite official oath, and commenced acting as commander of the brigade, and thereby interrupted the official action of the relator.

The alternative mandamus requires the defendant to permit the relator to exercise the office of brigadier-general of the seventh brigade, without any interruption or intrusion from or by the defendant, or to signify the cause why he will not do so. The defendant claims a right to the office under the commission

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and general order to him, which he contends were fully warranted by the act of April 17, 1854. He also objects to the relator's right to execute the duties of the actual commandant of the brigade, at the time when the commission and orders of the 5th of June, 1855, were issued.

The counsel for the defendant contended, on the argument, that the solicited remedy by mandamus would be inappropriate under the circumstances stated by the relator, as, if his claim was well founded, he might and should have resorted to the action substituted by the Code for the writ of *quo warranto*, (§ 482, *sub. 1.*) It is undoubtedly true, as was decided in the case of *The People agt. The Corporation of the City of New-York*, (3 Johns. Ca. 79,) that where an office is already filled by a person who has been admitted and sworn, and is in by color of right, a mandamus is never issued to admit another person. The proper remedy for the applicant was formerly by a *quo warranto*, and would now be by the substituted action. But an important consideration in the case in question is, which of the two competitors actually fills the disputed office. The relator had been for several years before, and was, at the time when the commission to the defendant was issued, the actual occupant, and claimed then, and still claims, under color of right, to hold the office. He has never at any time relinquished it. If his claim is valid, neither the commission to the defendant nor the accompanying order of the commander-in-chief, nor the subsequent interference by the defendant, would constitute an actual expulsion from the office. The possession would follow the right, as it uniformly does where acts of ownership are simultaneously exercised by contestants, and especially where the actual title is in the prior occupant. This, then, if the plaintiff's claim is well-founded, is not a case of expulsion, but of interference by the defendant with the functions of an office actually held by another. In such a case, the incumbent should not be required to elect to consider himself out of the possession of the office, and then to resort to a tedious action to procure his restoration. Besides, he could not institute the action without the assent and co-operation of the attorney-general,

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and that officer might so far doubt the justice of his claim, and especially where it might be based upon the assertion of the assumption of unauthorized power by the executive, of whom he is the official adviser, as to withhold his consent, and then the unlawfully-ejected officer would be without a remedy; or if there should be any, it would be very circuitous. It seems to me, that the interests of the officer, and, in a case like the present, of the public, require a more certain, adequate and speedy remedy. He should be promptly quieted in the discharge of his duties, and the many who are subjected to his command in the performance of their military duty, should be informed without unnecessary delay to whom they owe obedience as their lawful superior officer. I think that if the relator is entitled to any relief it should be by mandamus. That mode of proceeding will not deprive the defendant of any right to which he would be entitled in an action in the nature of a *quo warranto* under the Code. He may, in the one case, rely, as he might have relied in the other, upon his title, and if there had been any question of fact, it might have been submitted to a jury.

The main question in this controversy is, which of these gentlemen has the better title to the actual command of the seventh brigade of our state militia?

The relator was duly elected a brigadier-general by the field-officers of his brigade in 1841. He held the office, and was in the discharge of its duties, when the act of May 13, 1846, was passed. Under that act a brigade was formed, consisting of the militia of his previous command, with a slight exception, with the addition of the militia of the three counties on Long Island. The relator was assigned to the command of the brigade thus constituted, in pursuance of a provision contained in the eighth section of that act, which is in the following words: "The brigadier-general in commission and highest in rank, residing in such brigade district, shall be the commanding officer of such brigade." He held such command when our present state constitution went into effect. By that instrument the provision for electing brigadier-generals by the field-

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officers of the brigade, was continued. The fifth section of the eleventh article is in the following words:—

“The commissioned officers of the militia shall be commissioned by the governor; and no commissioned officer shall be removed from office unless by the senate, on the recommendation of the governor, stating the grounds on which such removal is recommended, or by the decision of a court-martial, pursuant to law. *The present officers of the militia shall hold their commissions subject to removal as before provided.*”

The next (sixth) section provides, that if the mode of election and appointment of militia officers, directed by that constitution, should not be found conducive to the improvement of the militia, the legislature might provide a new mode, “if two-thirds of the members present in each house should concur therein.” That the relator held the office of brigadier-general when that constitution came in force, and could be removed only pursuant to its provisions, there can be no doubt. He had not then been degraded from the office. The bounds of the brigade commanded by him had been greatly extended, and therefore, it is true, that it then comprehended many whose field-officers had no voice in his election. But I am not aware that it has ever been decided that one holding an elective office shall be denuded of it by the enlargement of the district which elected him, and to which his official action was confined. The universal practice has been the other way. Additions have been made from time to time to the territories of the United States, of some of the states, of counties, and of towns, and in all cases the jurisdiction of the federal, state, county and town authorities, has been extended in the newly-acquired territory, although its inhabitants had no voice in their election. The constitutional provision prescribes the mode of their election, but not the limits of the territory over which their authority might extend. If the alteration of the militia districts, effected by the act of 1846, had ejected the officers in such districts, none of the field-officers, and but few of the company-officers, would have continued in command. That act did not contemplate so great and extensive a change, nor was it, in fact, made. The constitutional

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requisition was satisfied by the mode of their election. There was no express confinement of their action or power to the limits of their original districts, nor was there any reason why they should be thus limited by implication.

Had the act of 1846 provided that the various militia officers might be transferred to districts wholly new, that might have been deemed an evasion of the constitution, and so far void; but that act carefully provides that the retained officer shall be the highest in rank in the consolidated district of which his own former district in which he resided, should constitute a part. I am satisfied that the alterations made by the act of 1846 did not require new elections of militia officers, and that therefore the relator was in the lawful command of the brigade to which he had been assigned when the constitution, adopted in the same year, went into operation.

The act of May 13, 1847, called for a change in the relator's district, by expressly separating the Long Island counties, and by requiring, in effect, the association of other territory. But that act contained the provision that the brigadier-general residing in the district highest in rank, (with certain requisites, which it is unnecessary to specify, as the relator confessedly had them,) should have the command of the brigade. Under this act the counties of Putnam and Rockland were added, and the number of the brigade altered.

I have already stated that the addition of territory to the relator's original district did not require a new election: neither did the change in the number. It could not be seriously contended that the latter change was anything more than nominal. The relator was, I think, lawfully placed in the command of the new brigade, and continued to hold it until the commission to the defendant was issued. If that commission was valid, it in effect removed the relator from the office of brigadier-general of his brigade.

I can see but little difference in removing an officer, and depriving him permanently of his powers. The one involves as much degradation as the other—and I think is equally prohibited by the constitution. That instrument was not designed

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to guard the name of office simply, and to leave the substance unprotected—to retain the husk while it abandoned the fruit. The governor had not the power thus summarily to remove the relator. His removal could be effected only by a resolution of the senate, on the recommendation of the governor, or by the decision of a court-martial.

The power to issue the commission to the defendant is claimed for the governor under the act of April 17, 1854. By the fifth section of title two of that act, it is provided that brigadier-generals shall be chosen by the field-officers of their respective brigades. That does not alter the mode prescribed by the existing constitution. Neither does it, nor does any other part of the act, propose to remove those who held the office at the time; on the contrary, the ninth section of the same title directs that whenever the office of a brigadier-general is vacant, the commander-in-chief shall issue an order for an election to fill the vacancy. The forty-third section of the same title, which is supposed to confer the power upon the governor to commission the defendant without an election, and thus to supersede the relator, is as follows:—

“The commander-in-chief is hereby authorized and empowered to appoint and commission the brigade, regimental, and company-officers necessary to facilitate the organization of all military districts *not now sufficiently organized* to authorize an election. All officers superseded by such appointment shall become supernumerary officers.”

It is not material to inquire whether this section, if it referred to permanent officers, would not be in conflict with the provision in the constitution relative to their election; and, as it does not appear to have been passed by a vote of two-thirds of the members present in both houses of the legislature, void for that reason, as it contains a qualification which I think makes it inapplicable to this case. The power can be exercised, if at all, only in cases where the district is not sufficiently organized to authorize the election of its officers. The statute does not call for a general re-organization of the militia. If it did, the provision last quoted would, for the time, annul the method of

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choosing military officers provided by the constitution. If, as the defendant contends, the relator's brigade had not received a full organization, what was necessary to complete it? Its limits had been defined, the regiments and companies duly designated, and it was (it is to be presumed, as nothing appears to the contrary) duly officered. Nothing appears to show any defect in its organization, and as the power claimed was an innovation upon the constitution, it should be construed strictly, and the circumstances under which alone it could be exercised, (if it could be exercised at all,) should have been distinctly stated. The allegation of an inference or conclusion, without setting forth the facts on which it is founded, is insufficient.

The existing seventh brigade has been, as I have already shown, fully organized under the act of 1847, and placed under the relator's command. The act of 1851 (*ch. 180, § 1,*) simply authorized, or purported to authorize, the commander-in-chief to appoint and commission the officers necessary to complete the organization of all military districts *not then organized*. This could have no effect upon the relator's brigade, as that had been, and was then under a complete and efficient organization.

The act of 1854 (Title 4, Art. 1, § 3) expressly provides, that the division, brigade, regimental, and company districts, should continue to be and remain as the military districts of the state. They were to be subject to such alterations or consolidations as the commander-in-chief should see fit to make. It is unnecessary to inquire whether any, and if any, what changes would so far affect its organization as to render necessary or sanction an election or appointment of new officers, as no change of this brigade district has ever been made. The provisions in the act of 1854, as to the election or appointment of officers, were not, I think, intended to remove the then existing officers. The statute does not expressly require that, and an intention to create so great, unnecessary, and impolitic a change, ought not to be lightly inferred.

Upon the whole, it seems to me that the governor was not

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authorized by the act of 1854, or any other statute, to displace the relator, or to appoint the defendant. Both the commission to the defendant and the general order accompanying it were null and void.

A peremptory mandamus is awarded, but without costs.

SUPERIOR COURT.

OSSIAN GREGORY and others agt. APPLETON OAKSMITH and others.

An improper joinder of parties is not a ground of demurrer.

Special Term, Feb., 1856.

THIS was an action by part-owners of a vessel, against the ship's husband, for not insuring the vessel, her freight, &c. The complaint set forth, that the remaining part-owners had been applied to by the plaintiffs to join in the action as plaintiffs, and had declined so to do, and were for that reason made defendants.

The defendant, Oaksmith, demurred for a defect of parties.

WILLIAMS & BARNARD, *for plaintiffs.*

BEEBE & DONOHUE, *for defendant, Oaksmith.*

SLOSSON, Justice. The improper joinder of parties is not a ground of demurrer, even if it appeared on the face of the complaint that such improper joinder existed, which it does not. It is only for defect or want of parties that a demurrer lies. (*§ 144, Code.*)

Leary is properly made a party defendant. (*§ 119, Code.*)

It is no part of the duty of a ship's husband, as such, to effect insurance for the owners, any more than it is the duty of one partner to effect insurance of the entire ship. Each owner has a distinct property, and must protect his own interest, unless

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by common agreement they provide for insurance to be effected through the agency of one of their number.

A ship's husband may, however, be specially authorized by the owners to effect insurance of their interests; or it may become his duty to do so by reason of the custom, or usage, of the port to which the vessel belongs.

The complaint alleges, "that by the custom of merchants at the city of New-York, as such ship's husband, as well as by the understanding and agreement of the said Oaksmith and the said plaintiffs, and said Leary, (the co-defendant and co-owner with the plaintiffs,) and as such agent, &c., it became, and was the duty of said Oaksmith, and said Oaksmith was possessed of full power, authority, and means, in all respects, for said plaintiffs and said Leary, to obtain insurance, &c."

I understand this averment to assert, or to intend to assert, that the duty to insure devolved upon the defendant both by the agreement of himself with the owners, and by the usage and custom of the port of New-York regulating the practice of ship's husband.

If this be proved, a clear cause of action is made out.

The whole amount of interest represented by the parties to the action, as far as the complaint develops it, is only six-sevenths of the vessel.

It is nowhere alleged that Oaksmith owned the other one-seventh, nor is any party named who does.

Here, if anywhere, there is a defect of parties; but as a majority in interest may, I think, appoint the ship's husband, and as there is a distinct allegation that the defendant was ship's husband of the ship, and the outstanding owner represents one-seventh only, the inference is that if not appointed by all the joint owners he was by those represented in the suit, who constitute a great majority. Then, as their shares are separate and distinct, there can be no objection to their recovering their several proportions of loss.

The demurrer is overruled, with costs.

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SUPREME COURT.

GEORGE SHERWOOD, appellant, agt. THE BUFFALO & NEW-YORK CITY RAILROAD COMPANY, respondent.

None of the provisions of the Code, in relation to "proceedings supplementary to execution," are applicable to judgments against corporations. (10 *How. Pr. R.* 487, *decides the same, so far as § 292 is concerned.*)

The proceeding under § 294 is one merely in aid of the principal proceeding against the judgment-debtor, and *must be had in connection with it*; and cannot be resorted to *independently* of any proceeding against such judgment-debtor.

Under the Code, an *attorney* has a claim in the nature of a *lien* upon a judgment recovered by him for his client, for his services in the suit, and a right, as against the client, to collect the judgment and retain the proceeds, or sufficient of them to satisfy his claim for his services.

By § 299, when a party is summoned before the judge under § 294, and denies the debt alleged to be due, or claims the property alleged to belong to the judgment-debtor, such debt or property shall be recovered *only in an action by the receiver.* Therefore the judge, upon these supplementary proceedings, has no jurisdiction to try such claim.

Niagara General Term, Sept., 1855.

Present, BOWEN, P. J., MULLETT and GREENE, Justices.

APPEAL from an order of the county judge of Wyoming county, dismissing proceedings supplementary to execution.

J. W. THOMPSON, *for appellant.*

J. G. HOYT, *for respondent.*

By the court—GREENE, Justice. The affidavits in this case show the recovery of a judgment by plaintiff against the defendant prior to the commencement of this proceeding, and that an execution had been issued to the sheriff of Wyoming county, where the judgment had been docketed, and returned unsatisfied. It also appears that, at some time prior thereto, the defendant had recovered judgments against Brainard & Smith, which were, at the time of the return of the execution, due and owing to the

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defendant. Upon these affidavits the plaintiff made an application to Scott, county judge of Wyoming county, for an order that Brainard & Smith appear and answer concerning the debts respectively owing by them to the defendant. An order was accordingly issued and served upon Smith & Brainard, requiring them to appear; but no order was made for the defendant's appearance. Smith & Brainard appeared on the return-day mentioned in the order, and were examined, and proved the recovery against them of the judgments set forth in the affidavit of the plaintiff.

On the same day John B. Skinner, 2d, appeared, and served a notice on Smith & Brainard, and on the judge, that he was attorney for the defendant in the actions in which the judgments were recovered; that both of the judgments were for costs; and that he (Skinner) owned or had a lien on the judgments, for his services as attorney in procuring them, to their full amount. On proof of these facts, the county judge denied the plaintiff's motion for an order that Brainard & Smith pay the amount of the judgments to him, on the ground that Skinner had a lien thereon for his services.

The order of the county judge was right, for several reasons.

First. It has been decided by this court, at general term, in the case of *Hinds agt. The Canandaigua & Niagara Falls Railroad Company*, (10 How. 487,) that the provisions of the Code, in regard to these proceedings, are not applicable to judgments against corporations. The court in that case held that resort must still be had against corporations in such cases to the remedies prescribed by the Revised Statutes against corporations. The proceeding in that case was under § 292, but the principle upon which it proceeds is applicable alike to all proceedings under the Code.

It was also held, in *Morgan agt. The New-York & Albany Railroad Company*, (10 Paige, 20,) that the provisions in the Revised Statutes, in relation to creditors' bills, for which these proceedings are a substitute, were not applicable to corporations.

It appears from the opinion of Justice JOHNSON, in the case

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first cited, that this court has also decided, in a case not reported, that the proceeding under § 294 is one merely in aid of the principal proceeding against the judgment-debtor, and *must be had in connection with it*, and cannot be resorted to independently of any proceeding against such judgment-debtor. (10 *How.* 459; *see also* 4 *How.* 178.)

I am inclined so to hold, on an examination of the statute. If this proceeding can be entertained in any other way than in connection with, and auxiliary to, the proceeding against the defendant in the judgments under § 292, debts due and property belonging to him may be applied on a judgment which has been paid; or, in other words, upon an alleged debt which he does not in fact owe.

Section 294 requires no notice to him. The proceeding may be commenced and conducted to its conclusion without his knowledge. A payment by his creditor of a debt due, or a delivery and application, by a third person, of property belonging to the defendant, pursuant to a judge's order, under § 297, would be good as against him, and thus, by such a proceeding, he might be deprived of his rights without a hearing.

The chapter of the Code in relation to supplementary proceedings, contains no provision by which the defendant, when he appears before the judge, can contest his liability to pay the judgment. But there are other remedies than those provided by this chapter, by which any injustice that might result from its provisions may be prevented. When a defendant is proceeded against under § 292, and denies the existence of the alleged judgment, or his liability to pay it, the judge before whom the proceeding is pending, might, probably, refer the question under the 4th section of chapter 2 of the first title of the act supplementary to the Code, and thus the question of the defendant's liability upon the judgment might be determined before he was compelled to pay it. But if that remedy is not applicable to such a case, the court in which the judgment was rendered would have power to stay the proceedings until the plaintiff could bring an action on the judgment, in which the question could be properly tested.

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After the defendant has had notice of proceedings under § 292 to enforce the judgment, and fails to appear or deny his liability to pay it, proceedings may be instituted under § 294, even without notice to him, without any great danger of compromising his rights. But to permit such a proceeding without any notice to the defendant of any proceeding in which he would have an opportunity to assert his rights, would open the door to great injustice and fraud. I do not think the 294th section, when read in connection with the other provisions of the chapter in which it is found, requires such a construction.

Upon both of the grounds above suggested, the proceeding before the county judge was entirely without jurisdiction.

This view of the case renders it unnecessary to decide upon the validity of Skinner's claim. I have no doubt, however, that an attorney has still a claim in the nature of a lien upon a judgment recovered by him for his client, for his services in the suit; and a right as against the client to collect the judgment and retain the proceeds, or sufficient of them to satisfy his claim for services.

The cases cited in 4 *Barb. S. C. R.* 47, fully establish this right in favor of the attorney, as the law stood before the Code. In my opinion, that statute has not changed the law on this subject. It was always the *party* who recovered costs, not the attorney; and in the absence of notice to the other party of the attorney's lien, payment might be made to the prevailing party, and such payment would be a good satisfaction of the judgment.

But this was a question which the county judge had no jurisdiction to decide. It is expressly provided by § 299, that when a party is summoned before the judge, under § 294, and denies the debt alleged to be due, or claims the property alleged to belong to the judgment-debtor, such debt or property shall be recovered only in an action by the receiver. This provision, applicable in its terms to one party only, embodies a principle so essential to the rights of parties, that it must be held applicable to *all cases* where the validity of a claim, or the title to property sought to be applied to the

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payment of the judgment, is disputed. It could not have been intended, and can never be tolerated, until the legislature shall expressly so declare, that questions of this character should be decided in this summary way, or in any proceeding but an action conducted according to the established course of the law in adjusting such controversies.

The order of the county judge must be affirmed.

SUPERIOR COURT.

FREDERICK M. KELLEY and others agt. FRANCIS H. UPTON.

When a verdict is taken at the trial term for the plaintiff, subject to the opinion of the court at the general term, the court at general term may dismiss the complaint, although no leave is given at the trial term to move for such dismissal.

If a new trial in such cases is granted on suggestion that the proof held to be insufficient can be supplied, the court will impose upon the plaintiff the payment of the costs of trial, and all subsequent proceedings, as a condition of such new trial.

General Term, Feb., 1856.

I. T. WILLIAMS, *for plaintiff,*

Cited 1 Str. 300; 3 Term R. 507; 6 id. 71; Gra. & Wat. on New Trials, Vol. 1, p. 602; 4 Seld. 107; 2 Kern. 386, 340, and 341.

E. W. STOUGHTON, *for defendant.*

THIS action was brought to trial before the chief justice with a jury, at the last November term. The defendant, at the close of the plaintiffs' proofs, moved to dismiss the complaint, upon several grounds. The court declined to grant the motion,

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but (the defendant offering no proof) directed a verdict for the plaintiff, subject, however, to the opinion of the general term. After the argument of the cause at the general term, the court dismissed the complaint.

At a subsequent day of the same term, upon the suggestion of the plaintiffs' counsel, that the further proof which the court deemed necessary could readily be supplied, the court modified the former order, and directed a new trial, on condition that the plaintiff pay the defendant's costs of the trial, and all subsequent proceedings, including the costs of the argument.

SUPREME COURT.

HOWELL HOPPOCK and RICHARD B. GREENWOOD agt. JAMES C. DONALDSON.

JESSE EGERT agt. THE SAME.

It is settled, by the decision of the court of appeals, in *Chappell agt. Chappell*, (2 Kern. 215,) that a statement in a confession of judgment, which merely sets out a promissory note without stating the consideration, is not a compliance with the provisions of the Code. (§ 383.)

Also, that where a judgment is thus defective, it may be set aside upon the application of a junior judgment-creditor.

Held, that one object of the provision of the Code by § 383 was, to remedy the mischief which was assumed to exist under the old method of entering up judgments upon bond and warrant of attorney, where the generality of those instruments afforded hardly an approximate indication of the nature or extent of the demand, or the consideration upon which it was founded.

On the other hand, had the legislature intended to require, in the case of a debt founded on a sale of goods, for instance, a statement of the kinds, qualities, prices charged, times of purchase or delivery in the minutest detail, it is manifest they would have expressed that intention in language far more precise and specific, instead of the brief and general terms in which the provision is expressed. Such a statement, instead of being "a concise statement of the facts," would be as minute and prolix as a bill of particulars; which clearly is not required, and would hardly be tolerated. (*All the reported cases on this subject examined.*)

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In this case, the judgment was confessed for the sum of \$1,021.60, and the statement was, "The sum of \$521.60, it being for goods and merchandise heretofore delivered to me, the said defendant, and which is now due.

"And also the sum of \$500, being the amount of a bill of goods this day purchased of him, the said plaintiff."

Held, that the first portion of the judgment which embraces the statement of the sum of \$521.60 could not be upheld. And that the other statement, being more specific, was sufficient.

Oneida Special Term, Feb., 1856.

ON the 19th of April, 1855, a judgment, in the case second above entitled, was entered up for the sum of \$1,021.60, by confession under § 383 of the Code; and on the 28th of December, 1855, a like judgment by confession was entered in the first entitled suit for \$397.09. The plaintiffs in this suit now move to vacate and set aside the first judgment, on the ground that it was confessed to defraud creditors—nothing whatever being due thereon, and also because the statement and confession is not in conformity to the requirements of the 383d section of the Code.

CHARLES H. DOOLITTLE, *for motion.*

JOSEPH BENEDICT, *opposed.*

BACON, Justice. From the facts disclosed in the several affidavits which have been read on this motion, I am of opinion that the *bona fides* of the judgment in favor of Egert has not been successfully impeached. It was entered for a debt actually owing by defendant, the balance now claimed and shown to be due the plaintiff being the sum of some \$600 and over. The question, which has been elaborately discussed, and which remains to be disposed of, is, whether it can be upheld as a judgment by confession under the Code? The judgment is confessed for the sum of \$1,021.60, and the following is the statement and specification: "The sum of \$521.60, it being for goods and merchandise heretofore delivered to me, the said defendant, and which is now due: and also the sum of \$500, being the amount of a bill of goods this day purchased of him, the said plaintiff."

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It is insisted by the moving counsel that the whole judgment is void; or if not, that it is incapable of being sustained for more than a portion of the demand.

The section of the Code under which the judgment was confessed has been the subject of construction in several cases which have been presented for adjudication; and it becomes necessary to examine them, to ascertain if any principle has been established in the light of which the judgment can be upheld.

The language of § 388 is, that if the judgment be for money due, or to become due, "it (the statement) must concisely state the facts out of which it (the debt) arose, and must show that the sum confessed therefor is justly due, or to become due." The object of the codifiers, and of the legislature, was as stated in the note to the section, as originally reported, to prevent abuse, and so that the purpose and intent could neither be denied nor concealed; or, as is well stated by GARDINER, C. J., in *Chappell* agt. *Chappell*, (2 Kern. 215,) "to compel the parties to spread upon the record a more particular and specific statement of the facts out of which the indebtedness arose, thus enabling them by a comparison of that statement with the known circumstances and relations of the debtor, to form a more accurate opinion as to his integrity in confessing the judgment than was possible under the former system."

In the first reported case, involving the construction of this section, (*Plummer* agt. *Plummer*, 7 Howard 62,) Judge MASON, in the sixth district, held that it was not a sufficient compliance with this provision, to describe a promissory note without setting out the consideration of the note. The judgment in that case simply set out the note, giving the date, amount and time of payment. It was held insufficient, and the judgment was set aside.

In the case of *Mann* agt. *Brooks*, (7 How. 449,) Justice CADY, on the other hand, held that a confession which merely set out a promissory note, as the ground of the indebtedness was sufficient—dissenting from the opinion of MASON. In this case, however, before the motion was made, the judgment had, on application to the court, been amended by filing a statement

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setting forth the true consideration of the note: so that the motion might very properly have been decided without any expression of opinion on the other point. This decision in this case, which was at special term, was affirmed at the general term, but on what ground does not appear from the report. (8 *How.* 40.)

The doctrine of this case was concurred in, substantially, by Justice ALLEN, of the fifth district, at special term, in *Whiting* agt. *Kenyon*, (7 *How.* 458;) but since the decision in the court of appeals in *Chappell* agt. *Chappell*, (2 *Kern.* 215,) these cases can no longer be considered as authority; and it may now be deemed settled, that a statement which merely sets out a promissory note, without stating the consideration, is not a compliance with the provision of the Code. This case also holds, that where a judgment is thus defective, it may be set aside upon the application of a junior judgment-creditor.

The next case that occurs in the reports, was decided by Justice CIPPEN, at the Otsego special term, in Nov. 1853. (*Post* agt. *Coleman*, 9 *How.* 64.) The statement in that case was of a promissory note for a given sum, dated Nov. 3, 1853, and payable one day after date; and it was then added, "said note was given for a quantity of coal, purchased of the plaintiffs for the use of the Brainard House, that the defendant had been, and was then keeping." This was held sufficient. It omits to state that the defendant purchased the coal of the plaintiff, or that it was delivered to the defendant, and does not give the date of the purchase, except by reference to the date of the note; but it was held that, by necessary implication, the statement contained all that the section of the Code referred to could reasonably require.

In *Schoolcraft* agt. *Thompson*, (7 *How.* 446,) Justice T. R. STRONG, of the seventh district, decided, at special term, that a statement by confession of a debt, "for goods, wares and merchandise, sold and delivered to defendant by Schoolcraft, Raymond & Co., of which firm the plaintiff was a member, purchased in the years 1851 and 1852," was insufficient. He held that it conveyed no information of any considerable value,

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neither giving the quantities nor prices, nor the time with any definiteness when the purchases were made. On an appeal to the general term from this decision, the order was reversed. (9 *How.* 61.) Justice JOHNSON, who gave the opinion of the court, holding that it never could have been intended to require a party to give a detailed statement of the transaction or dealings between the parties, or a bill of particulars. He adds, "The facts out of which the indebtedness arose, were the sales of goods, &c., to the defendant. These are all clearly and concisely stated, and the time within which they occurred, so that no one could possibly mistake the nature of the transaction out of which the indebtedness is alleged to have arisen."

The last reported cases are *Purdy* agt. *Upton*, and *Marshall* agt. *Upton*, (10 *How.* 494,) decided at the Westchester special term in March, 1855. The confession in each case was for \$300, averred to be justly due, and in the first case the statement of the debt was "for labor and building materials furnished by the plaintiff to the defendant." In the other case, "for goods and groceries, and for one horse and one cow, delivered to said Upton to the amount of \$300, now due to said Marshall." These statements were held to be entirely insufficient, and the judgments were set aside. These were very bald cases indeed; and there can be no question that the decision was right, although Justice BROWN concedes that the time, the place, the quantity, the price, or par value, may not be indispensable requisites to make the statement effectual to support the judgment.

Having thus gone over and collected the cases which are to be found in the books, it remains to be seen whether any general principles can be extricated from them which will aid us in determining whether the judgment now in question can be upheld in whole, or for any part of the amount claimed thereon. I think it will be conceded that one object of the provision was, to remedy the mischief which was assumed to exist under the old method of entering up judgments upon bond and warrant of attorney, where the generality of the instruments used, as the foundation of the judgment, afforded hardly an approximate

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indication of the nature or extent of the demand, or the consideration upon which it was founded. And so, on the other hand, had the legislature intended to require, in the case of a debt founded on a sale of goods, for instance, a statement of the kinds, qualities, prices charged, times of purchase, or delivery, in the minutest detail, it is manifest they would have expressed that intention in language far more precise and specific, instead of the brief and general terms in which the provision is expressed. Such a statement, instead of being in the language of the section—"a *concise statement of the facts*"—would be as minute and prolix as a bill of particulars. This clearly is not required, and would, indeed, hardly be tolerated in a confession made under the authority of this section.

In the light of these cases, collectively considered, I am of opinion that the portion of the judgment which embraces the sum of \$521.60 cannot be upheld. It does not state that any purchase was made of any one, and more especially gives no date whatever to the transaction, or the several transactions, out of which the delivery of the goods arose.

This, it is manifest, would afford no clue whatever to a creditor who might desire to inquire into the consideration; for he is neither directed to the person by whom the delivery was made, nor is any time whatever indicated at or within which the transaction took place. The other statement is more specific. It gives the amount; it states that it is for goods that day purchased of the plaintiff, and is signed by the defendant, and the whole is verified by his affidavit of the truthfulness of the statement. As no credit is stated on the purchase, it must be assumed it was a sale for cash on delivery. I think this is sufficient, and affords the *indicia* from which a satisfactory investigation can be made.

Some question is made in the affidavits in regard to the actual delivery of the goods; and, in point of fact, it appears that they were not manually delivered to the defendant, or rather, not taken away by him, until the ensuing day, and, as to a part of them, not until some days subsequently. But the purchase was actually made on the day the judgment was entered up; a

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considerable portion of the goods were then selected by the defendant, and all were ready for him.

That they were not taken from the store was not the fault of the plaintiff, and he should not suffer by the delay of the defendant to remove his property, and for which delay the plaintiff was in no manner responsible.

The order will therefore be, that the lien of the judgment of Egert, and the levy under his execution, be sustained, and have priority to the extent of \$500, and interest from the date of the judgment, together with the costs of entering the same and sheriff's fees therein, and the balance is postponed to the lien of the judgment of the plaintiffs in the suit first above entitled.

No costs of this motion are allowed to either party.

NEW-YORK COMMON PLEAS.

VAN WYCK agt. HOWARD.

Where the goods of a *guest* are lost at an inn, the loss is presumed to have occurred through *negligence* on the part of the *innkeeper*; which, however, he may rebut by showing that it was the negligence of the guest. An innkeeper is held to the exercise of *extraordinary vigilance* in protecting the property of his guests.

He has a right to make such regulations in the management of his inn as will more effectually secure the property of his guests, and operate as a protection to himself; and it is incumbent upon the guest, if he means to hold the innkeeper to his responsibility, to comply with any regulations that are just and reasonable, when he is required to do so.

But whatever the innkeeper requires to be done by the guest, it must appear that such requisition is in itself reasonable, and that the guest is distinctly informed of what is necessary to be done on his part. Whether the request is made orally or in the form of a printed notice, it should be, in terms, so clear and unmistakable as to leave room for no reasonable doubt as to what was intended. The guest should know precisely what he is to do before he can be chargeable with negligence for not doing it.

A printed notice at the hotel, put up on the door of the room occupied by the guest, was as follows: "Gentlemen are particularly requested to bolt their

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chamber-doors on retiring for the night, to prevent intrusion from strangers, either by design or mistake, and to lock their doors during the day, and leave the key at the office. They are also cautioned against leaving any money or valuables in their rooms. Packages of value, properly labeled, can be deposited in an iron safe kept in the office."

Held, that this notice was insufficient to protect the landlord from liability, where it appeared that his guest had \$450 in his portmanteau, in his room, and about 7 o'clock P. M., he locked his portmanteau, and quitted his room, locking the door and putting the key in his pocket. He returned at 11 o'clock the same evening, and found the portmanteau broken open, its contents strewn about the room, and the money and his jewelry gone.

This notice may very well have been understood (as it seems it was, in fact) as merely cautioning the guest against leaving money or valuables loose or exposed about the room.

An innkeeper's liability is not limited, like that of a carrier of passengers, to the care merely of that species of property which comes under the denomination of *baggage*. If he receives his guest and his goods, whether goods, chattels, and movables of any kind or description, he charges himself with their safe keeping—his liability immediately attaches.

A traveller, just arrived from Europe, having in his portmanteau \$450, in foreign and American gold pieces, is a sum which no court or jury could say is more than is necessary for his ordinary travelling expenses; it would, therefore, come within what is usually known as baggage.

Special Term, Jan., 1856.

THIS was an action brought by Van Wyck against Howard, proprietor of the Irving House, to recover the value of the property stolen from one Forbes while he was there as a guest.

A. R. DYETT, for plaintiff.

J. E. BURRILL, JR., for defendant.

DALY, Judge. The argument at the close of the trial, that the plaintiff might take judgment for the value of the jewelry, (\$32,) was an admission of the competency of the witness Forbes; of the sufficiency of the assignment, and a waiver of the objection made to certain questions as leading. The only point, therefore, to be determined is, whether the plaintiff can recover for the money which was lost.

Where the goods of a guest are lost at an inn, the loss is presumed to have occurred through negligence on the part of

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the innkeeper, which he may, however, rebut, by showing that it was occasioned by the negligence of the traveller; and in this case it is insisted that Forbes had notice of the fact that an iron safe was kept in the office of the defendant's hotel, in which "packages of value, properly labeled, might be deposited;" that he was guilty of negligence in not giving his money to the defendant or his agent, for deposit in this safe: and it is further insisted that the liability of a hotel keeper extends no further than to the care of such property as comes under the denomination of baggage; and that the money lost in this case formed no part of the baggage of the guest.

It appears that Forbes had \$450 in his portmanteau; that about 7 o'clock in the evening he locked his portmanteau, and quitted his room, locking the door, and putting the key in his pocket. He returned at 11 o'clock the same evening, and found the portmanteau broken open, its contents strewn about the room, and the money and jewelry gone. A printed notice or card was pasted on the inside of the door of the room, containing, among other things, the following: "Gentlemen are particularly requested to bolt their chamber-doors on retiring for the night, to prevent intrusion from strangers, either by design or mistake, and to lock their doors during the day, and leave the key at the office. They are also cautioned against leaving any money or valuables in their rooms. Packages of value, properly labeled, can be deposited in an iron safe kept in the office."

The superintendent of the hotel testified that Forbes admitted that he had seen the card posted up on the chamber-door, and read it; but that, as he intended to stay at the hotel but for a few days only, before taking private lodgings, he did not think it worth while to put his valuables in the safe; and that the notice did not caution persons against leaving valuables in their trunks, but only against leaving them about the room. Forbes also testified that he had seen the notice, and to the effect that he regarded it as merely cautioning lodgers not to leave things about their rooms, carelessly—not as warning them against leaving anything in their portmanteaus; and that he did

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not think it worth while to put anything down stairs, as it was his intention to leave immediately.

There can be no doubt of the innkeeper's right to make such regulations in the management of his inn as will more effectually secure the property of his guests and operate as a protection to himself, and that it is incumbent upon the guest, if he means to hold the innkeeper to his responsibility, to comply with any regulations that is just and reasonable, when he is requested to do so. (*Richmond* agt. *Smith*, 8 *Barn. & Cres.* 9; *Burgess* agt. *Clements*, 4 *M. & S.* 306.)

In *Sanders* agt. *Spencer*, (3 *Dyer*, p. 266,) the innkeeper told the traveller to lay his goods in packs in a certain chamber within the inn, under a lock and key provided for that purpose, and that he would warrant them safe—otherwise, not. But the traveller left them in an outer court, from which they were stolen, and it was held that the innkeeper was not responsible. And if the defendant in the present case had notified *Forbes* that he should not leave any money locked up in his trunk, but should deposit it in the iron safe, kept in the office, it may be that the defendant would not have been responsible for its loss. But the printed notice did not advise *Forbes* that he was not to leave money locked up in his trunk. It merely informed him that packages of value, properly labeled, might be deposited in an iron safe, kept in the office, and cautioned him against leaving money or valuables in his room. This may very well have been understood, as *Forbes* appears to have understood it, as merely cautioning him against leaving money or valuables loose or exposed about his room. If the landlord, to enable him the more effectually to secure the property, requires something to be done by the guest, it must appear that what was required was in itself reasonable, and that the guest was distinctly informed of what was necessary to be done on his part. Whether the request was made orally or in the form of a printed notice, it should be in terms so clear and unmistakable as to leave room for no reasonable doubt as to what was intended. The traveller should know precisely what he is to do before he can be chargeable with negligence for not doing it; and as the

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notice did not apprise him that he was not to leave money locked up in his trunk, he cannot be regarded as guilty of negligence in so leaving it.

For well-founded reasons of public policy, the innkeeper is held to the exercise of extraordinary vigilance in protecting the property of his guest. If it is lost, the loss is presumed to have arisen from negligence or connivance on the part of the innkeeper, and to overcome that presumption it rests upon him to show that it was occasioned by inexcusable and culpable negligence on the part of the traveller, and this the defendant has not shown.

An innkeeper's liability is not limited, like that of a carrier of passengers, to the care merely of that species of property which comes under the denomination of baggage. The carrier of passengers performs a distinct employment. He undertakes to transport the passenger and his baggage. The baggage is what travellers usually carry with them, or what is essential or necessary to the traveller in the course of his journey. The care of it is incident to and forms a part of the contract for the carriage of the passenger, for which the carrier is compensated by the fare or rate agreed upon. But for anything beyond mere baggage the carrier is entitled to extra compensation; it is not embraced or compensated for in the fare paid by the passenger; and if he has anything with him, not coming under the denomination of baggage, of which the carrier is not advised, or for the carriage of which he receives nothing, it is at the risk of the passenger, and the carrier is not liable in the event of its loss. But the occupation of the innkeeper is different. He keeps a place of entertainment for the reception of all who travel, whether in their own vehicle or otherwise, in which the farmer carrying his produce to market, the trader vending his wares about the country, the traveller with simply his baggage, or the passenger journeying on foot, equally find accommodation; and where provision is made, not merely for the personal entertainment of the guest, but for the housing and safe keeping of the property he brings with him, while he rests or reposes at the inn.

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In modern times great changes have taken place in respect to the nature of the accommodation afforded by inns. Anciently, the inn was a kind of warehouse or hotel, in which travellers in journeying from one part of the country to the other for the purposes of trade or commerce, found a temporary accommodation of their merchandise. But, now that the superior facilities exist for the transportation of merchandise, as respects the cost, the speed, and the security of its transport, this description of inn has fallen very much into disuse, except in remote or sparsely-settled districts. In cities and large towns, to which travellers journey by railroad or steamboat, inns, or, as they are commonly known in this country, hotels, are simply establishments for the reception of travellers accompanied merely with their ordinary baggage. The proprietors of such establishments, as they make no provision of the kind of accommodation that was afforded by the ancient inns, are under no obligation to receive a traveller with merchandise, and may, if they think proper, refuse to house or take care of it. But whatever may be the nature of the inn, or the kind of accommodation afforded, if the innkeeper receives the guest and his goods, he charges himself with their safe-keeping. The moment the goods are *infra hospitium*, the liability of the innkeeper attaches, and that liability extends to goods, chattels, and movables of any kind or description which the traveller brings with him. (*Calyes Case*, 8 Coke, 82; *Anthon's Law Student*, 55.)

The defendant, therefore, was chargeable with the safe-keeping of Forbes' portmanteau and all that it contained; and even if the defendant's liability extended no further than the care of the luggage of his guests, the money lost would come within what is usually known as baggage. Forbes was a traveller who had just arrived from Europe, having in his portmanteau \$450 in foreign and American gold pieces, a sum which no court or jury could say was more than was necessary for his ordinary travelling expenses.

The plaintiff is entitled to judgment of \$482.

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SUPREME COURT.

FRANCIS A. FALES agt. GERMON HICKS and others.

A defendant who is the *last endorser* on a note, is *presumed* to have transferred it to the holder.

Whether he did or not *indorse* the note, and whether he did or not *transfer* it to the plaintiff, is presumed to be within his own *personal knowledge*. If, therefore, he would answer these allegations, he must admit or deny them *positively*. Saying that he has no knowledge or information thereon sufficient to form a belief, will not do.

On an application for judgment, under the 247th section of the Code, the judge has the same jurisdiction, either *in or out of court*, to hear the application; and may grant such a motion *conditionally*; that is, to allow an *amendment* upon terms, &c. (*This seems to be adverse to the opinion of PRATT, J., in the case of Shearman agt. The New-York Central Mills, 1 Abbott, 190.*)

At Chambers, September, 1855.

MOTION for judgment on account of the frivolousness of the answer.

The complaint alleged that the defendant, Germon Hicks, on the 10th day of January, 1855, made his promissory note for \$500, payable sixty days after the date thereof, to the order of the defendant, Alertion Hicks; and that the defendants, Alertion Hicks and Joseph B. Hicks, afterwards endorsed the note; and the same was thereupon, for value received, transferred to the plaintiff, who is now the *bona fide* owner and holder thereof; that the note, at maturity, was duly protested for non-payment, and notice thereof given to the endorsers.

The defendant, Joseph B. Hicks, in his answer, stated that he had no knowledge or information thereof sufficient to form a belief, "that he had ever endorsed the note mentioned in the complaint, or that the same had ever been transferred to the plaintiff."

The plaintiff, pursuant to the 247th section of the Code, moved for judgment, on the ground that the answer is frivolous.

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The defendant produced an affidavit of merits, and asked leave, in case the motion should be granted, to answer anew on terms.

GEO. DAY, *for plaintiff.*

EBENEZER S. STRAIT, *for defendants.*

HARRIS, Justice. According to the allegations of the complaint, the defendant, Joseph B. Hicks, was the second endorser of the note in suit, and is to be presumed to have transferred it to the plaintiff. Whether he did endorse the note or not, or whether it was transferred to the plaintiff, may be presumed to be within his own personal knowledge. If he would answer these allegations, he should, therefore, admit or deny them positively. To say, in respect to the question whether or not he endorsed the note, that he has no knowledge or information sufficient to form a belief on the subject, is obviously an evasion. If, for any reason, he could not answer the allegation positively, that reason should have been stated. If, as was suggested by counsel upon the hearing of the motion, the defendant who made the answer doubted whether the note upon which the action was brought was the same note he had endorsed, he should have taken measures to satisfy himself upon this point before answering.

It will scarcely do to sanction the mode of answering adopted in this case, because the defendant is able to say that the note upon which the suit is brought may not be the same instrument he executed. So, in respect to the transfer of the note, the defendant who has answered, being the last endorser, is, presumptively, the party who transferred the note to the holder. He ought either to admit or deny the transfer, or show how it happens that he has no knowledge or information on the subject. (*See Edwards agt. Lent, 8 How. 28; Richardson agt. Wilton, 4 Sand. 708; Shearman agt. New-York Central Mills, 1 Abbott, 187; Thorn agt. The Same, 10 How. 19; Wesson agt. Judd, 1 Abbott, 254; Mott agt. Burnett, 1 Code Rep. N. S. 225; Hance agt. Remming, id. 204.*)

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The motion must be granted ; but the defendant has made an affidavit of merits, and it may be that the answer was framed under a misapprehension as to what was required : I think, therefore, that the defendant should be allowed to answer anew upon such terms as shall be just. I know it has been said by a learned judge, that no power is given to a judge, upon an application for judgment under the 247th section of the Code, to allow an amendment. (*Shearman agt. The New-York Central Mills*, 1 Abbott, 190.) But I can see no objection to granting such a motion *conditionally*. The party prejudiced by a frivolous pleading is authorized to apply to a judge, either in or out of court, for judgment, and the judge, *either in or out of court*, is authorized to give judgment.

If the application should be made in court, it certainly would not be doubted that the party whose pleading should be found defective, might be relieved on terms. The same jurisdiction to hear the application is, in this instance, conferred on the judge at chambers ; and he may, it seems to me, grant the same relief he would if he had heard the same case in court.

The plaintiff is entitled to judgment on account of the frivolousness of the answer, but with leave to the defendant, Joseph B. Hicks, to serve a new answer within five days after notice of this decision, upon payment of the costs of the motion, and stipulating to admit due service of notice of trial for the ensuing Rensselaer circuit.

Allen agt. Smillie.

SUPREME COURT.

JAMES H. ALLEN agt. JAMES SMILLIE.

An old declaration in debt for the penalty, a cognovit for that debt, and a judgment for the penalty of the debt, are now all unauthorized. Section 469 of the Code saves the old *rules* and *practice* of the court, when consistent with the act; but the *pleadings* are neither parts of the rules nor of the practice. The entry of a judgment, on a *bond* and *warrant of attorney*, given prior to the Code, is provided for "by sections 382, 383 and 384, upon the plaintiff's filing such bond and warrant of attorney, and the statement signed and verified by himself in the form prescribed by § 382."

Chapter 3 of title 12, together with § 424 of the Code, abrogates, in effect, the old declaration in debt for a penalty, and the judgment for the penalty, and the power of any attorney to appear on an old bond and warrant of attorney, to confess such a judgment. It substitutes, as the *judgment-roll*, the original bond and warrant of attorney, and the statement required by the above chapter, and the *endorsement* by the clerk upon the *statement*, and his entry of a judgment for the amount confessed with costs; and that amount, by sub. 1 and 2 of § 383, is the amount "justly due"—not the *penalty*.

The *statement*, thus required, should show "concisely the facts out of which it (the amount due) arose." This requires a *true* statement of those facts.

An *omission* of the clerk of the court, or a slight omission of the attorney, when the proceedings are all correct in other respects, may be *amended nunc pro tunc*, even on a motion to set aside the proceedings. (*See 3 How. Pr. R. 213.*) But a departure in many material respects from the requirements of a statute, not by the clerk of the court only, but by the party and his attorney, should not meet with the same favor.

If one "in the race of diligence," in his haste, stumbles and falls, so that another, who observes the requirements of the law, reaches the goal before him, there is no good reason for preferring the violator of the law to the one who reverently observes it.

Whatever doubts may have existed as to the necessity of *notice*, before entering judgment on a bond and warrant of attorney, after a lapse of ten years, under the old system, is removed by the provisions of the Code, which apply by analogy, in requiring notice of a motion to issue an execution, after *five* years from the entry of judgment.

New-York Special Term, March, 1855.

MOTION to vacate judgment.

On the 16th of November, 1843, Smillie executed his bond to Allen, in the penalty of \$10,000, conditioned for the pay-

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ment of \$3,000 and interest, on demand; and on the same day also executed a warrant of attorney to any attorney to confess judgment for him on that bond. On the 13th of November, 1854, affidavits were made by the subscribing witness to these instruments, proving them, and on the 3d of November the plaintiff made affidavit that the consideration for the *warrant of attorney* was land sold by him to one Peter Low, who gave to him a bond and mortgage for the payment of part of the purchase-money; that Smillie bought subject to that mortgage; and that the plaintiff commenced a foreclosure of the mortgage, and the *bond and warrant* of attorney were given in settlement of a balance due on said bond and mortgage; that the \$3,000 and interest, from 16th of November, 1843, were still due, and no part of it paid; and that the plaintiff had, on that day, seen and conversed with the defendant, and that he was alive at 10 A. M. of that day.

On these papers the plaintiff made an *ex parte* application to the court, without any notice to the defendant, and obtained an order to enter up judgment, pursuant to the *direction contained in the warrant* of attorney, for the sum of \$3,000 and interest from 16th of November, 1843. The plaintiff's attorney also made affidavit that the amount of the indebtedness, by the condition of the bond, was \$5,309.

The plaintiff, on these papers, entered up judgment on the 16th of November, 1854, precisely in the old form of a judgment on a bond and warrant of attorney to confess judgment, filing a declaration in debt for \$10,000, a cognovit, signed by an attorney, admitting that the defendant owes the \$10,000, and a judgment for the plaintiff to recover the *said debt*. The judgment was signed by the judge on the 22d Nov.

It now appears that the bond and warrant of attorney were not given on settlement of a balance due on said bond and mortgage, but that that mortgage was reduced to \$8,000, and a suit for a foreclosure of a subsequent mortgage, by defendant, carried on to a decree and sale, and that the plaintiff bought at such sale the land above-mentioned, subject to the \$8,000, and so satisfied that mortgage; and the plaintiff, in reply to the

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moving papers, makes his affidavit, that according to his recollection and belief, a judgment was entered in his favor against the defendant for the balance due to him ; and that, on the 16th of November, 1854, this was arranged, and the judgment against the defendant released, and the bond and warrant of attorney for the \$8,000 and interest given by the defendant ; and that the \$10,000 mortgage was never foreclosed, but was merged in the plaintiff's purchase.

It appears also that the plaintiff was advised by his counsel, that it was necessary, before entering judgment on the warrant of attorney, to show that the defendant was alive ; that he called to ascertain that fact, and then, instead of stating his object, or demanding payment, or giving any notice of his intention, he told the defendant that happening in passing, while looking for another person, to see defendant's name on the door, he had looked in to see how defendant was. That an execution was issued and delivered to the sheriff, who never called on the defendant with it, and that thereupon summary proceedings were taken against the defendant.

The plaintiff argued that the judgment was regular, as it conformed to the provisions of the Revised Statutes, and that those provisions were still in force

THOMAS FESSENDEN, *for motion.*

JOHN H. HULL, *opposed.*

MITCHELL, Justice. A declaration or complaint, plea, or answer, and the judgment thereon, belong to the class of pleadings rather than of practice : the practice relates principally to the time and manner in which the pleadings and process are to be served or entered. A book of pleading is complete which does not mention the latter subjects ; and a book of practice is complete which does not speak of the form in which a pleading or judgment is to be drawn. The Code (§ 140) abolished all forms of pleading theretofore existing, and declared that thereafter the forms of pleadings in civil actions in courts of record, and the rules by which the sufficiency of the pleadings were to

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be determined, were prescribed by that act. The old system of pleading was, therefore, repealed when it differed from the Code. An old declaration in debt for the penalty, a cognovit for that debt, and a judgment for the penalty of the debt, are now all unauthorized.

It was said § 469 saves the old rules and practice of the court when consistent with the act : it does—but the pleadings are neither parts of the rules nor of the practice.

There are two forms of judgment allowed under the Code : one when the action is by summons, and the other when it is by confession without action. Sections 382, 383, 384, apply to the last, if the confession is made since the Code took effect. But the codifiers also provided for the present case, where the bond and warrant of attorney were given before the 1st of July, 1848, when the Code first took effect, and prescribed the manner in which judgment should be entered in that case, namely, "in the manner provided by sections 382, 383, 384, upon the plaintiff's filing such bond and warrant of attorney, and the statement signed and verified by himself in the form prescribed by section 382." (Code, § 424.) They have thus expressly provided for the pleadings and the manner of entering judgment in this case, and made that express provision the rule, and so abolished any not conformable to it.

These sections form chapter 8 of title 12, and the first allows a judgment by confession in the manner prescribed by that chapter: then section 383 requires a statement in writing, to be signed by the *defendant*, and verified by *his oath*, stating the amount for which judgment may be entered, and authorizing the entry of judgment therefor; second, stating concisely the facts out of which it arose, and that the sum confessed is justly due, or to become due. Section 384 requires this statement to be filed with the clerk of the court, whose duty it becomes to endorse upon it, and enter in the judgment-book, a judgment for the amount confessed, with \$5 costs and disbursements; and it declares that the statement and affidavit, with the judgment endorsed, shall thereupon become the judgment-roll, and execution may issue thereon.

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Assuming that section 424 means to substitute the plaintiff in place of the defendant, in making the statement, and not to require his statement in addition to that of the defendant, there could not well be conceived a greater departure from the requirements of this chapter than this case presents.

This chapter, with section 424, abrogates, in effect, the old declaration in debt for a penalty, and the judgment for the penalty, and the power of any attorney to appear on an old bond and warrant of attorney to confess such a judgment. It substitutes as *the judgment-roll* the original bond and warrant of attorney, and the statement required by the above chapter, and the endorsement by the clerk upon the *statement*, of a judgment for the amount confessed, with costs; and that amount by subdivisions 1 and 2 of section 383, is the amount "justly due,"—not the penalty.

The statement thus required should show "concisely the facts out of which it (the amount due) arose." This requires a *true* statement of those facts. The plaintiff's statement, as filed, alleges the inducement to the giving of the warrant of attorney to have been a suit commenced by him to foreclose a mortgage of \$10,000, and a settlement of the amount due on that mortgage. His own allegation now is, that this was a mistake, arising from his haste, and that that mortgage was merged in a purchase made by him, and that the indebtedness was a balance on another mortgage given by the defendant. These are two entirely different causes of action; and the statement on file is not true, and so does not comply with the Code, and cannot sustain the judgment.

The chapter quoted requires the judgment to be for the amount justly due. This is for nearly double that amount. It requires the judgment to be endorsed on the statement, and entered in the judgment-book. It was not endorsed on the statement, and it does not appear that any entry of it was made in the judgment-book. The order of the court was to enter judgment for the \$3,000 and interest, but it was entered for the penalty.

An omission of the clerk of the court, or a slight omission of

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the attorney, when the proceedings are all correct in other respects, may be amended *nunc pro tunc*, even on the motion to set aside the proceedings. (*Wright agt. Alden*, 3 *How. Pr. R.* 213.) But a departure in many material respects from the requirements of a statute, not by the clerk of the court only, but by the party and his attorney, should not meet with the same favor, especially when there was a ready opportunity to give notice to the opposite party of the motion for judgment, and that was designedly avoided. That the defendant may dispose of his property if notice were given to him, is no reason for a different rule.

If the defendant would honestly prefer another creditor, and the law allows it, the court should not, by aiding an irregular course on the part of the plaintiff, defeat this right of the defendant. As well might it give judgment, in the first instance, without a summons being issued, when the defendant would not confess judgment, and then, from the same motive, let a summons, served afterwards, retrospect so as to save the judgment. If one "in the race of diligence," as it is sometimes called, in his haste, stumbles and falls, so that another, who observes the requirements of the law, reaches the goal before him, there is no good reason for preferring the violator of the law to the one who reverently observes it. If the fear was, that the defendant would fraudulently transfer his property, the law affords a remedy against such an act, and the plaintiff should trust in it.

The judgment was irregular, even according to the old practice. The judgment-roll was signed by a judge of the court, and not by the clerk. The judiciary act required all records of judgments and enrolments of decrees to be signed by the *clerk* of the court filing the same, without any fee or charge therefor. (*Laws 1847*, p. 335, ch. 280, § 53; and see *Manning agt. Guyon*, 1 *Code Rep. N. S.* 43.)

The question was argued, also, whether it was not necessary to give the defendant notice of the motion, to enter judgment, when the warrant of attorney was over ten years old. Justice BRONSON expressed himself inclined to the opinion that it was

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necessary. (*Manufacturers, &c., Bank of Philadelphia* agt. *St. John, 5 Hill*, 499.) *Graham*, in his *Practice*, (p. 774,) is of the same opinion.

Under our present system, by analogy, notice should be necessary, even when the bond and warrant are but five years old. A judgment is of much higher order, as evidence of debt, than a bond and warrant of attorney; and by the Code, (§ 284,) after the lapse of five years from the entry of judgment, an execution can be issued only by leave of the court, upon motion, with *personal* notice to the adverse party, unless he be absent, &c. This is on the principle, that after five years the defendant is not to have an execution issue against him, without an opportunity to show why it should not issue, and is applied even after judgment against him; much more should he have this opportunity when no judgment is yet obtained. If no notice be required in these cases, before judgment is entered, then the plaintiff, who has delayed ten years and over to enter judgment, may issue execution without notice, when one who had obtained the record-evidence of his claim cannot do so. Whatever doubt may have existed as to the necessity of notice before entering judgment on a bond and warrant of attorney, after a lapse of ten years under the old system, is removed by this provision. (See also *Currie* agt. *Noyes*, 1 *Code Rep. N. S.* 198.)

The judgment and all subsequent proceedings are set aside, with \$10 costs of motion.

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SUPREME COURT.

JOSEPH CLEMENT agt. CHARLES ADAMS.

The provisions of § 399 of the Code, in reference to the *notice* and examination of an assignor, &c., contain a *rule of evidence*, and are therefore applicable to *justicees' courts*.

The *payee* of a promissory note, who transfers it *by delivery*, is an *assignor of a thing in action or contract*, within the meaning of § 399 of the Code. (*It seems, that had it been considered that this question was an open one—not settled by authority—it would have been decided the other way.*)

It was the intention of the legislature, by the last part of § 399 of the Code, *to prohibit an assignor from being a witness against an executor or administrator*; and where an assignee (or trustee) is a *party*, *notice* of intention to examine an assignor is required, to enable the adverse party to procure the attendance of the person or persons whom he represents, or be prepared to show that it could not be procured.

In cases where the other party to the contract is a party to the record, the *complaint or answer is a sufficient notice*.

Fourth District, Saratoga General Term, Jan., 1856.

Present, C. L. ALLEN, PAIGE, JAMES and ROSEKRANS, JJ.

THIS was an appeal from the judgment of a justice of the peace, certified into this court. On the trial below, the plaintiff proved his cause of action and rested. The defendant, as a set-off, produced a note, purporting to be made by the plaintiff, payable to Jonathan Hudson or bearer, and to prove said note called the payee as a witness. The plaintiff objected to this witness being sworn, because he was an assignor of the note, and ten days' previous notice of his intended examination, &c., as required by § 399 of the Code, had not been given. The objection was overruled, and the plaintiff excepted. The witness was sworn, and testified that the note was transferred to the defendant after maturity, by delivery; and that the same was the note of the plaintiff. The plaintiff then offered himself as a witness to the same matter; to which the defendant objected, on the ground that the witness, Hudson, was not an assignor within the meaning of § 399 of the Code. The ob-

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jection was sustained, and the plaintiff excepted. The justice allowed the note as a set-off, and rendered judgment accordingly, and from that judgment the plaintiff brings this appeal.

SEARING & PUTNAM, for plaintiff.

HOAG & CRANE, for defendant.

By the court—**JAMES**, Justice. Three questions are presented by this appeal, arising under § 399 of the Code, viz.: 1st. Are the provisions of § 399 applicable to courts of justices of the peace? 2d. Is the payee of a negotiable promissory note, who transfers it by delivery, an assignor of a thing in action or contract, within its meaning? and, 3d. In what cases is notice of the party's intention to examine an assignor as a witness requisite?

The first question must be considered as settled in this district. We have repeatedly held that § 399 is a rule of evidence, and thus applicable to justices' courts by virtue of § 64, subd. 15, of the Code.

Were the second a new question, we should hold that the payee of a negotiable promissory note, who transferred it by mere delivery, was not an assignor within the true intent and meaning of said § 399. In its popular sense, an assignor is one who transfers a right of action not transferable at common law; and such, we have no doubt, was the sense in which the word was used, in this instance, by the legislature. But a different construction has been given to the section in several of the judicial districts, and we deem it better to adopt such construction rather than multiply conflicting decisions. Such construction does no violence to the express language of the act. Strictly speaking, an assignor is one who transfers property to another, and a promissory note is a chose in action. (*Seeley agt. Seeley*, 2 Hill, 496.) We, therefore, hold that the witness, Hudson, was an assignor within § 399. It therefore follows that the justice, in refusing to allow the plaintiff to be sworn in his own behalf, to the same matter testified to by Hudson, committed an error, for which this judgment must be reversed.

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(9 Bar. Rep. 214; 11 id. 634; 16 id. 580; 18 id. 532; 10 How. Pr. Rep. 94.)

The consideration of the third question is not necessary to a disposition of the cause; but as much conflict of decision has arisen, it may not be improper for us to express an opinion for the future guidance of the profession, at least, in this district.

Section 398 declares, that "no person offered as a witness shall be excluded by reason of his interest in the event of the action."

Section 399 provides, 1st. The last section shall not apply to a party to the action, nor to any person for whose immediate benefit it is prosecuted or defended. 2d. Where an assignor of a thing in action or contract is examined as a witness on behalf of any person deriving title through or from him, the adverse party may offer himself as a witness to the same matter, and shall be so received. 3d. But such assignor shall not be admitted to be examined in behalf of any person deriving title through or from him against an assignee, or an executor, or administrator, unless the other party to such contract or thing in action, whom the defendant or plaintiff represents, is living, and his testimony can be procured for such examination, nor unless at least ten days' notice of such intended examination of the assignor, specifying the points upon which he is intended to be examined, shall be given in writing to the adverse party."

This section is properly divisible into three parts, which I have numbered *first*, *second* and *third*. The first part qualifies and limits the preceding section: the second extends to the adverse party the right to offer himself as a witness; and the third, (which forms the whole of a single sentence, disconnected from the two preceding parts,) "applies to a definite class of cases," claims or set-offs, against an assignee, (trustee,) an executor, or administrator. Separated thus, the section is free from much confusion, and easily understood and applied. The legislature, no doubt, intended, by the last part of this section, to prohibit an assignor from being a witness against an executor or administrator; and where an assignee (or trustee) is a party, notice of intention to examine an assignor was required

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to enable the adverse party to procure the attendance of the person or persons whom he represents, or be prepared to show that it could not be procured. In cases where the other party to the contract is a party to the record, the complaint or answer is a sufficient notice. These views are more clearly expressed and fully sustained in *Collins agt. Knapp*, (18 Bar. 532,) *second judicial district*; *Gable agt. Kinny*, (11 How. Pr. Rep. 248,) *fifth district*; *Farley agt. Flanagan*, (1 Smith, 313,) and *Burnett agt. Gwynne*, (2 Abbott's Pr. Rep. 79,) *New-York Common Pleas*.

The contrary doctrine was first held in this district in *Knickerbacker agt. Aldrich*, (7 How. Pr. Rep. 1,) and was followed in *Jagoe agt. Alleyn*, (16 Barb. 580,) *seventh district*; and approved *Pelham agt. Bryant*, (10 How. Pr. Rep. 60,) *sixth district*.

Thus stands the question upon authority. Did this appeal turn upon this question, we should feel bound by the case of *Knickerbacker agt. Aldrich, supra*; but as it does not, we deem it proper to say, that hereafter we shall not regard that case as a binding authority.

Judgment of the justice reversed.

NEW-YORK COMMON PLEAS.

MORGAN L. SAVAGE agt. HENRY E. BEVIER & J. L. BEVIER.

The rule that a *bill or note* payable to order, must be transferred by *indorsement*, applied only to make the instrument negotiable, so that the *holder might sue in his own name*. But the transfer by *delivery* was sufficient to enable the holder to sue in the *name of the payee*.

By an *assignment* of a note, the *assignee* acquires the *title*, and an action under the Code can be maintained in his name. (§ 111.)

Insolvency of the maker of a promissory note, does not seem to be an *exception* to the requiring notice of demand and non-payment to the indorser; and

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certainly not, unless the insolvency existed at the time the note was made or indorsed; and whether that will excuse or not, *quere?* Where a *subsequent promise* of an indorser is relied on, the plaintiff must show, affirmatively and clearly, that the defendant knew, *when he made the promise*, that he had not received regular notice of protest. Mere information of presentation and of non-payment, or of non-payment alone, and not by notice in the regular way, unless given by the holder, or some person representing him, *before* the promise made, is not sufficient to charge the indorser.

Special Term, Feb., 1856.

DEMURRER to complaint.

The defendant, H. E. Bevier, indorsed a note made by his brother, J. L. Bevier, payable to the order of A. Ferguson, to secure a debt due to Ferguson. A. Ferguson transferred the note by assignment, and without indorsement, to the plaintiff, who sues the defendants to recover the amount and another claim. The defendant, H. E. Bevier, demurs to the complaint, upon the ground that he is not liable as maker or guarantor, but as an indorser only, and is discharged by the omission of the payee or holder to notify him of the presentment of the note, and of its non-payment. The plaintiff also alleges a promise by H. E. Bevier to pay the note made after it had matured.

MARSH, LEONARD & HOFFMAN, for defendants.

BOWMAN & GREEN, for plaintiff.

BRADY, Justice. The defendant, H. E. Bevier, is an indorser, and not a maker or guarantor; and to charge him, notice of presentment and of non-payment was necessary. (*Hall* agt. *Newcomb*, 7 *Hill*, 416; *Spies* agt. *Gilmore*, 1 *Com.* 821.) The payee could have maintained an action against him. (*1 Com. supra, and Ch. WALWORTH's opinion*, 7 *Hill*, *supra*, p. 420.) And it was not necessary, to enable the plaintiff to maintain an action against him, that the payee should indorse the note. The rule that a bill or note, payable to order, must be transferred by *indorsement*, applied only to make the instrument negotiable, so that the holder might sue in his own name. But the transfer

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by delivery was sufficient to enable the holder to sue in the name of the payee. By the assignment of the note alleged, the plaintiff acquired title to the note, and the action under the Code can be maintained in his name. (*Code*, § 111; *Hastings* agt. *M'Kinley*, 1 *E. D. Smith*, 273.)

It is not denied that the defendant, H. E. Bevier, had not *regular* notice of non-payment: indeed, no notice to him is alleged, except as hereafter mentioned; and his liability as an indorser is based upon his subsequent promise. There is nothing in the complaint alleged to excuse the omission to notify the indorser of the presentation of the note at maturity, (if any such presentation was in fact made, which does not appear,) and of non-payment. It is true, that it is alleged that the maker was insolvent, but not that such insolvency existed at the time of the making or indorsement of the note. Insolvency does not seem to be an exception to the rule requiring notice, (*Taylor* agt. *Snyder*, 3 *Denio*, 145,) and certainly not unless the insolvency existed at the time the note was made or indorsed. (*Agan* agt. *M'Manus*, 11 *Johns.* 180, *and whether that will excuse or not, quere?*)

It is also alleged in the complaint that the note was presented to the maker *before* its maturity, and that he was asked whether he would be ready to pay it. That he said he would not, and would write to the defendant, to see if he (the defendant) would be ready to pay it; and that the maker did accordingly write. That the defendant had notice of the maturity of the note, and that the holder would look to him for payment thereof. And further, that the defendant and the maker, at *the time of the maturity of the note*, and before and afterwards, were in constant correspondence, and that the defendant well knew all the facts and circumstances with reference to the note, its maturity and non-payment; but what those facts and circumstances were, other than those stated, does not appear. The correspondence alluded to is not stated to have been *about the note*, and the allegation is herein stated as broadly as it is made.

There is no allegation that there was no demand, and that the defendant knew it; and no allegation that the defendant

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knew that he had no regular notice of presentation or non-payment, or either, when the note matured, or that the defendant knew of the omission to charge him. That he knew that the maker could not pay, and that the holder looked to him, is not sufficient to charge him on his subsequent promise. If, under the circumstances, he had promised *before* the maturity of the note, and induced the omission of notice to him, such promise would be regarded as a waiver of notice, and binding. As to subsequent promises, the rule is different. There the plaintiff must show affirmatively and clearly that the defendant knew, *when he made the promise*, that he had not received regular notice. (*Trimble agt. Thorne*, 16 Johns. R. 152; *Crain agt. Colwell*, 8 Johns. R. 2d ed. 299,—*in which several authorities to the same point are stated in a note,—and Duryee agt. Dennison*, 5 Johns. R. 248,—*KENT, Ch. J., citing a number of cases to sustain his enunciation of the doctrine.*)

Mere information of presentation and of non-payment, or of non-payment alone, and not by notice in the regular way, unless given by the holder, or some person representing him, *before* the promise made, would not be sufficient within the rule, and, it seems, for the reason that the indorser must know of his exemption from liability at the time of his promise. That promise, then, becomes a new contract, made voluntarily, with full notice of his legal rights, upon which he will be held. In this case none of these requisites are averred, and the demurrer is, therefore, well interposed.

Judgment for plaintiff on the demurrer.

Weeks agt. Southwick and others.

SUPREME COURT.

WHITING WEEKS agt. GEORGE SOUTHWICK and others.

Where, in the progress of the action, an injunction has been dissolved on motion of defendant, and a report of a referee in the action subsequently made in favor of the defendant, but *no judgment entered*, the defendant is not entitled to an order of reference to ascertain his *damages* by means of the injunction. He must wait until the court shall *finally decide* that the plaintiff was not entitled thereto—that is, until judgment is perfected. (*This agrees with Shearman agt. N. Y. Central Mills*, 11 How. Pr. R. 269.)

In an action to compel the specific performance of a contract for the sale of real estate, the prevailing party is not entitled to an *extra allowance* under § 308 of the Code. The action is for mere equitable relief, and is not within the provisions of § 308.

A party will be charged with the *costs of a motion*, where otherwise he would not, if he asks *costs against his opponent without any foundation for it*.

Albany Special Term, July, 1855.

MOTION for reference, &c.

The action was brought to compel a specific performance of a contract for the sale of real estate. A preliminary injunction was granted, restraining the defendants from committing waste, &c. A motion was subsequently made to dissolve the injunction. The motion was founded on the pleadings, and was granted.

In April, 1855, the cause was referred for hearing and decision; and, in July, the referee made his report, dismissing the complaint, with costs. No judgment has been entered upon the report.

The defendants moved for a reference, to ascertain and report the amount of damages sustained by the defendants, by reason of the issuing of the injunction, and also for an *extra allowance* of costs, and for the costs of the motion.

W. S. KENYON, *for plaintiff.*

E. COOKE, *for defendants.*

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HARRIS, Justice. The motion for a reference is premature. The undertaking, upon issuing the injunction, is, that the plaintiff will pay to the party enjoined, such damages as he may sustain by reason of the injunction, *if the court shall finally decide that he was not entitled thereto*. Such final decision cannot be said to have been made in this case. True, the report of the referee is to that effect. But judgment has not been entered upon that report. It may never be entered. Until it is entered, so that the decision of the referee becomes the judgment of the court, the defendant's right to damages is only contingent. (*See Code, § 222; Dunkin agt. Lawrence, 1 Barb. 447.*)

Nor is this a case for an extra allowance. The action is not brought to recover money or property, but merely for equitable relief. Such a case is not within the provisions of the 308th section of the Code. (*See Sprong agt. Snyder, 6 How. 11; Osborn agt. Betts, 8 id. 31.*)

I should not have thought this a proper case for charging the defendants with the costs of the motion, were it not for the fact that they have themselves claimed such costs, without presenting, in their own papers, a case which, under any circumstances, would have entitled them to costs.

The motion must, therefore, be denied, with costs.

SUPREME COURT.

ROBERT BURROUGHS agt. LEWIS REIGER and others.

The filing of a notice of the pendency of the action, in actions affecting real property, does not affect subsequent purchasers or incumbancers, until the complaint is filed, although the action may be commenced by the actual service of process.

The filing of such a notice before the action has been commenced, by the service of process, is a nullity.

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Where the plaintiff in such action files, with the papers composing the judgment-roll, (as he is required to do,) the *proof of service* of the summons and complaint, he is concluded by such proof, as to the time when the action was commenced.

Kings Special Term, Feb., 1856.

MOTION to set aside writ of assistance.

A. JORDEN, *for motion.*

B. P. BARNARD, *opposed.*

ROCKWELL, Justice. This is a motion made in behalf of Magdalena Hetsel, a person in possession of certain real estate affected by this action, to set aside a writ of assistance, issued to the sheriff of Kings county, commanding him to put the plaintiff into possession of the premises. Mrs. Hetsel purchased the premises for a valuable consideration; there is no evidence that she ever had actual notice of the pendency of this action; she was not made a party to it, and consequently cannot be bound by the judgment, nor charged with constructive notice of the pendency of the action, unless she purchased *pendente lite*, and after the notice required by law had been duly filed.

Whether she did so purchase or not, is the material question involved in this motion.

The premises were sold and conveyed, and possession thereof delivered to Mrs. Hetsel on the 24th day of May, 1854.

Was this action at that time pending?

It appears from the affidavit of the plaintiff's attorney, that the complaint and a notice of the pendency of the action were filed in Kings county clerk's office on the 19th of April, 1854; and the attorney also states, that on the same day, or the day following, he served a copy of the summons and complaint upon Thomas Burroughs, one of the defendants. From an examination of the affidavit of service forming a part of the judgment-roll, it however appears that the summons and complaint were served on Thomas Burroughs and the other defendants on the third day of July, 1854.

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An action cannot properly be said to be pending until after it has been commenced. It is pending during the interval between the time of its commencement and its final determination.

In § 127 of the Code, it is provided that actions shall be commenced by the *service* of a summons.

In § 130, it is provided that the complaint need not be served with the summons, and in such case the summons must state where the complaint is or will be filed. From this it would seem to be regular to file the complaint before the commencement of the action.

In § 132, it is provided that in actions affecting the title to real property the plaintiff, at the time of *filing* the complaint, or at any time afterwards, may file a notice of the pendency of the action, and that from the time of filing only shall the pendency of the action be constructive notice to a purchaser or incumbrancer of the property.

It is contended on the part of the plaintiff that, as the complaint may be filed before the commencement of the action, and as the plaintiff by the express terms of the statute may, at the time of filing the complaint, file a notice of the pendency of the action, and that the pendency of the action shall be constructive notice from the time of filing the notice, it conclusively follows that the notice may be filed before the commencement of the action, and that purchasers are to be charged with constructive notice from the time of such filing.

But the difficulty is, that notice of the pendency of an action which has not been commenced is an impossibility and an absurdity. It is not a notice of a fact, but a statement of a falsehood. The fact stated does not exist. The action is not pending. To allow the title to property to be clouded and tied up by a deceptive and mendacious notice of this description, would tend to produce great hardship and injustice. The action might not be commenced by the service of process for years after the filing of such a notice; neither the vendor nor purchaser can remove the cloud. Whereas, if the statement in the notice was

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true, if the action was, in fact, pending, the plaintiff might be compelled to move on to judgment, or abandon his claim.

The true construction and meaning of the statute is, that although the action may be commenced by the actual service of process, the filing of a notice of the pendency of the action shall not affect subsequent purchasers or incumbrancers, until the complaint is filed. So that a person who, upon investigating the title in the clerk's office, discovers the notice, may also find, in the same office, the complaint, and ascertain from that the precise nature and scope of the action. But filing the notice before the action has been commenced by the service of process, is a nullity.

Under the practice before the Code, although as against the defendant the suit might be considered as commenced from the issuing, and even for certain purposes from the teste of process, yet an innocent purchaser could only be charged with constructive notice of the pendency of the suit from the time of the service of the process. (*Murray agt. Ballow*, 1 J. Ch. Rep. 566; *Hayden agt. Bucklin*, 9 Paige, 512.)

But the question remains, when was this action commenced by the service of the summons? Judgment in this case was rendered against Thomas Burroughs and all the other defendants except Lewis Reiger, upon their failure to answer the complaint. The Code (§ 281) provides that, in such a case, the following papers shall be attached together and filed, and shall constitute the judgment-roll, namely, the summons and complaint, *proof of service*, and that no answer has been received, the report, if any, and a copy of the judgment. And in order to obtain a judgment in such a case, it is necessary to file with the clerk proof of service of the summons and complaint. (*Code*, § 246.)

From the affidavit on file in this case, it appears that the action was commenced by the service of the summons and complaint on Thomas Burroughs and the other defendants on the 3d day of July, 1854. The affidavit of the plaintiff's attorney, which has been read upon this motion, however, states that a previous service of the summons and complaint was made upon

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Thomas Burroughs on the 19th or 20th of April, 1854, and he insists that such service constituted the actual commencement of this action.

I think the plaintiff is concluded by the affidavit which he has put on file upon which his judgment is founded, and which has become a part of the judgment-roll. The time when the action was commenced was an essential fact, which it was necessary for the plaintiff to establish by evidence before he could obtain his judgment. To allow him to show that in his evidence this fact is untruly stated, and to controvert the truth of his own record, is not admissible. The record shows that Mrs. Hetsel did not purchase *pendente lite*. Is her title, or that of a purchaser from her who, in examining the title in the proper office, finds this record and relies upon it, liable at any time hereafter to be disturbed by the plaintiff's showing that the record is untrue?

I do not wish to be understood as imputing any unfairness to the plaintiff's attorney in this case. There is nothing in the case which warrants such an imputation. But the construction of the statute, and the rule of practice for which they contend, might, in the hands of unscrupulous practitioners, be productive of fraud and injustice.

The views which I have taken of this motion render it unnecessary to express an opinion upon the other points which were discussed upon the argument.

The motion to set aside the writ of assistance is granted, but, under the circumstances, without costs.

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SUPERIOR COURT.

JAMES E. COOLEY and JOHN KEESE, respondents, agt. WILLIAM BEACH LAWRENCE and WILLIAM B. LAWRENCE, Jr., appellants.

In removing a cause from the state courts to the circuit court of the United States, the act of congress requires that it be made to appear to the satisfaction of the state court that a suit is commenced by a citizen of the state in which the suit is brought, against a citizen of another state; next, that the matter in dispute exceeds the *sum or value* of \$500, exclusive of costs.

Again: the defendant shall, *at the time of entering his appearance in such state court*, file a petition for the removal of the cause for trial into the next circuit court to be held in the district where the suit is pending, and offer good and sufficient surety for his entering in such court, on the first day of its session, copies of said process against him; and also for his there appearing and entering special bail in the cause, if special bail was originally requisite therein.

The jurisdiction of the state courts, and that of the United States courts, is *concurrent*. And it is an admitted rule that, in cases of concurrent authority, the tribunal which first obtains jurisdiction, and is competent to administer it, will retain it, and another will not interfere. The act of congress, however, confers a privilege innovating upon this rule, and prescribes how and when this privilege may be exercised. Therefore the *statute* must be, in its fair construction, pursued, or the acknowledged jurisdiction of the first tribunal must be sustained.

Now, what is the meaning of the phrase "*entering his appearance in the state court*," which the *statute* employs? (*The authorities upon this question fully examined.*)

Held, that the entry of an appearance in a state court must be interpreted by the course and practice of that court; and that what is held in such court to be a submission to its authority in the cause, whether coerced or voluntary, must be deemed an appearance. And further, when such submission has once been made, it cannot be retracted.

Therefore *held*, where the defendants appeared by counsel in open court, upon the argument of a motion for injunction—read affidavits to oppose it—the endorsement of such affidavits with the names of the attorneys of the parties, and a recital of all this in an order of the court, that few acts could be more conclusive of an *appearance* in the state court.

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General Term, Oct., 1855.

Present, OAKLEY, Ch. J., DUER, BOSWORTH, CAMPBELL and HOFFMAN, Justices.

APPEAL from an order denying a motion to remove the cause to the circuit court of the United States, and to stay proceedings.

PETER Y. CUTLER, *for respondents.*

JAMES N. PLATT, *for appellants.*

By the court—HOFFMAN, Justice. William Beach Lawrence, one of the defendants in this action, had granted a lease to the plaintiffs of certain premises in the city of New-York, with covenants of renewal. He made the usual affidavit of the tenants' holding over after the expiration of the term, and obtained from a justice a summons to show cause why possession of the premises should not be delivered to him, under the statute of this state.

While the proceedings before the justice were pending, the plaintiffs herein commenced their action, and in their complaint set forth the covenants of renewal in the lease, and averred a fulfilment of all the covenants binding upon them, and stated a demand for a renewal of the lease according to its provisions. They asked judgment for a specific performance of such covenants of renewal, and an injunction to restrain the defendants from further prosecuting their proceedings for obtaining possession in the justice's court.

An order to show cause why an injunction should not issue was granted by one of the justices of this court, with a temporary injunction to restrain the proceedings until such application could be heard. This order, with the summons and complaint, were personally served upon both defendants. They appeared upon the return-day, the 10th of May, 1855, by their counsel, to oppose the same; and presented and filed with this court an affidavit, entitled in the action, endorsed with the name of Platt, Gerard and Buckley, defendants' attorneys. On this, and the arguments of counsel, the motion was resisted.

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On the 16th of May an order of this court was made as follows :—

“ An order having been made in the above-entitled action, on the 10th day of May, instant, upon the complaint of the plaintiffs, and the affidavit of James E. Cooley, one of the plaintiffs, requiring that the above-named defendants do refrain from further prosecuting certain summary proceedings which they, as landlords, have instituted, and which were then pending before JAMES GREEN, Esq., the justice of the justice’s court for the first district, in and for the city and county of New-York, for the removal of the plaintiffs in this action as tenants, and by G. W. Ackerman, Wm. Wellstood, Henry Peters, J. Ackerman, Lewis Lyman, G. F. Peterson, G. S. Humphrey, W. G. Mickell, P. Girard, F. Orzar, as under-tenants, from the premises Nos. 377 and 379 Broadway, in the city of New-York, now occupied by them, and that the said defendants do refrain from further proceeding in the said matter, and from procuring to be issued any warrant or other process for the removal of the said above-named, or any of them, from said premises; and that the said defendants do refrain from instituting any other proceedings for the removal of the said persons, or any of them, from the said premises, until the further order of this court, and that they show cause on Monday (then) next, the 14th instant, at 10 A. M., why the said injunction order should not be continued until the final judgment in this action; and the said parties having duly appeared, pursuant to the said order, to show cause—and the defendants’ counsel having read the affidavits of the defendants, and the plaintiffs’ counsel having read affidavits on their part, and on hearing Mr. Cutler for the continuance of the injunction order, and Mr. Gerard in opposition thereto—It is ordered that the said injunction order be continued until the final determination of this action, and that the plaintiffs file an undertaking in the sum of five thousand dollars, to be executed by the plaintiff, Cooley, in addition to the undertaking in the sum of five thousand dollars heretofore made and filed by him in this action,

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and that the said bond be executed with sureties in the usual manner."

On the 24th of May, 1855, the defendants filed their petition (with the requisite bond) for the removal of this action into the circuit court of the United States, and to stay all further proceedings on this action. On the 25th of May an order to show cause why such removal and stay should not be granted, was made ; and on the 6th of June, 1855, an order was made as follows :—

"The defendants' motion to remove this action into the circuit court of the United States, coming on to be heard, and having been argued by Mr. Platt for the motion, and Mr. Cutler in opposition thereto ; and it appearing to the court that the defendants appeared by their counsel and opposed a motion for an injunction, and read and filed papers in opposition to such motion ; and the court being of opinion that by so doing the defendants submitted themselves to the jurisdiction of this court, and virtually appeared in this action, and that such appearance was made on the 14th day of May last, and before the said petition for removal was filed, and that it is, therefore, too late to make such application for removal ;

"It is ordered, that the said motion to remove the said action to the circuit court of the United States, and to stay all proceedings in this court, be, and the same is hereby denied, without costs."

The case comes before this court upon an appeal from this order ; and it has been strenuously and fully argued on behalf of the defendants. It is the first case brought before the general term of this court, and has received a careful consideration.

The act of congress may be thus analyzed : It is to be made to appear to the satisfaction of the state court that a suit is commenced in, by a citizen of the state in which the suit is brought, against a citizen of another state ; next, that the matter in dispute exceeds the aforesaid *sum, or value*, of five hundred dollars, exclusive of costs.

Again : the defendant shall, *at the time of entering his ap-*

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pearance in such state court, file a petition for the removal of the cause for trial into the next circuit court to be held in the district where the suit is pending, and offer good and sufficient surety for his entering in such court, on the first day of its session, copies of the said process against him, and also for his there appearing and entering special bail in the cause, if special bail was originally requisite therein. These pre-requisites being complied with, it shall then be the duty of the state court to accept the surety, and proceed no further in the cause; and any bail that may have been originally taken shall be discharged.

The preceding section of the same act (*Act 1789, Ingersoll's Abridg.* § 9, p. 87) declares that the circuit courts shall have original cognizance, *concurrent with the courts of the several states*, of all suits of a civil nature at common law or in equity, where the matter in dispute exceeds, exclusive of costs, the sum or value of \$500, and (among other cases) the suit is between a citizen of the state where the suit is brought, and a citizen of another state.

The appellate jurisdiction of the supreme court of the United States extends to cases between citizens of one and citizens of another state, only in the cases specified in the 25th section of the act of 1789. (*See Federalist, No. 82.*) A final decision of the highest court of this state upon the merits would not, I apprehend, be appealable. But a decision upon this order, if ultimately affirmed, may be so. There is drawn in question the construction of a statute of the United States, and the decision would be against a right claimed under such statute. At any rate, a final judgment would be reversed if the refusal to remove is error.

This appears to be the result of *Kanouse agt. Martin*, (15 *How.* 200,) and of *Gordon agt. Longest*, (16 *Peters*, 104.) In the former, the court of common pleas, after a petition filed, appearance entered, and bond proffered, allowed the sum claimed in the declaration to be reduced from \$1,000 to \$499. The superior court, on writ of error, refused to consider this amendment, as it did not appear upon the record; and the su-

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preme court of the United States held this to be wrong, and that the superior court ought to have inspected the proceedings.

No one contests that the jurisdiction of the state courts, and that of the United States courts, is concurrent. It is an admitted rule, that in cases of concurrent authority, the tribunal which first obtains jurisdiction, and is competent to administer it, will retain it, and another will not interfere. It is equally certain that the act of congress confers a privilege innovating upon this rule, and prescribing how and when this privilege may be exercised. It seems to me a manifest deduction that the statute must be, in its fair construction, pursued, or the acknowledged jurisdiction of the first tribunal must be sustained.

In accordance with such a view, the courts of the United States have remanded causes, where the application was too late, or the state court had improperly allowed the removal.

In *Gibson agt. Johnson*, (1 Peters, C. C. 44,) the defendant allowed two terms to intervene between the time of his appearance and his petition for removal. The state court allowed the petition to be considered as entered on the day of filing the petition. The circuit court refused to entertain the cause. See, also, *Wright agt. Wells*, (1 Peters' C. C. 220,) where a rule was obtained to show cause why a removed action should not be remanded; and the case of the *Administrators of Belknap agt. The Northern Railroad Company*, (25 Vermont, 715,) where the cause was, upon motion, remanded, the circuit court not having jurisdiction. (See, also, *Ladd agt. Tudor*, 3 Wood & Minot, 326.)

In *Ward agt. Arredondo*, (1 Paine's C. C. Rep. 410,) *Ward*, a citizen of New-York, had filed a bill in equity in New-York against the *Arredondos*, who were aliens, and *Thomas*, a citizen of New-York. The latter was held to be not a mere nominal party, and hence it was decided by the circuit court that it had not jurisdiction. A motion had been made by one of the *Arredondos* to remove the cause; and the present motion was, that his appearance be entered in the circuit court,

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which motion was denied, and the cause remanded to the state court.

The right of determining whether the state court will continue to exercise an admitted jurisdiction in a cause, must exist to some extent in that court in the same manner as it exists in the circuit court of the United States, to decide whether it possesses it. In each case the court is governed by the statute, and in each tribunal that statute must be interpreted and applied to the particular case. The state court must be satisfied as to the sufficiency of the surety. It must be satisfied that the sum or value in dispute exceeds five hundred dollars, a question regulated by the amount claimed in the action. (16 Peters, 104.) And it is to judge whether the petition has been filed *at the time of entering the appearance* in that court. Thus far a discretion, indeed a duty, is incumbent upon the state court.

The question, then, comes to this: What is the meaning of the phrase, *entering his appearance in the state court*, which the statute employs? The personal appearance in court upon the return of the writ, which was the course at the common law, cannot be the meaning. Previous to the statute of Westminster 2d, (13 Edw. 1, c. 10,) both plaintiff and defendant appeared in person. (5 Barn. & Ald. 540.)

The appearance by an attorney, which before had been sometimes specially permitted, was sanctioned by the statute in all cases. Still the attorney's appearance was personal, and at last the practice grew up of a constructive appearance. (*Stephens on Pleading*, 29-36.)

Among appearances of this character was that by special bail when required, or by common bail, or by formally entering an appearance with the clerk; or by an attorney serving notice of retainer, where no bail was required. When a defendant had endorsed a promise to appear on a writ non-bailable, the plaintiff's attorney was to enter a common rule. (*Burrill's Pr.* vol. I, 112, 113.)

We find also, that it was once decided that the word *venire*, in a plea, was a statement on record of the defendant's appear-

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ance in court. But it was afterwards held that the word *dicit*, without *venit*, was enough: for the defendant's making a defence shows him to be in court. (*Salkeld*, 544; *Comyn's Digest Abatement*; 1 *Stephens*, 480.)

By a rule of the supreme court, of this state, which has long been in force, service of an appearance or retainer by an attorney, shall, in all cases, be deemed an appearance, except where special bail is required. And the plaintiff, on filing such notice at any time thereafter, may have the appearance of the defendant entered *nunc pro tunc*. (*Rule 26 of Sup. Court*; *Rule 25 id.*, 1847; *Rule 7*, 1854.)

The notice of retainer was, in *Francis agt. Sitts*, (2 *Hill*, 362,) held to have the same effect as if the defendant had actually entered an appearance with the clerk. In *M'Kenzie agt. Van Zandt*, (1 *Wend.* 1,) a notice of a motion to be made by an attorney, as attorney for the defendant, was held equivalent to a notice of retainer, and that to an appearance. (*See also Quick agt. Merrill*, 3 *Caines*, 133.)

By the 139th section of the Code, from the time of the service of a summons in a civil action, or the allowance of a provisional remedy, the court is deemed to have acquired jurisdiction, and to have control of all the subsequent proceedings. A voluntary appearance of a defendant is equivalent to personal service of the summons upon him.

The summons prescribed by the Code, and used in this case, no complaint accompanying it, does not require a defendant to appear, but only to answer. (§ 128.) By the 130th section, the defendant may compel service of the complaint by causing notice of appearance to be given, where the complaint is not served with the summons. When it is, beyond all doubt an answer, with notice of retainer by an attorney, would be a sufficient appearance.

Under the 139th section, this court has held, that where a defendant served an answer, it was such a voluntary appearance as precluded him from saying that jurisdiction did not appear on the record, on the ground that it did not appear that one of the parties, jointly liable on contract, had been served

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with process, or resided within the city. The objection was personal, and cured by such appearance. (*Mahany* agt. *Pennan*, 1 *Abbott*, 34.) So in *Higgins* agt. *Rockwell*, (2 *Duer*, 650,) Justice *Bosworth* says, the voluntary appearance of a party subjects him to the same liabilities as if the summons had been personally served upon him ; and he acquires all the rights of a party personally served.

What, then, is the entry of an appearance in a state court must be interpreted by the course and practice of that court ; and, I think, that what is held in such court to be a submission to its authority in the cause, whether coerced or voluntary, must be deemed an appearance : and further, when such submission has once been made, it cannot be retracted.

With this exposition several decisions in our state will be found to agree, where the motion has been either granted or denied. Thus, in *Jackson* agt. *Cantine*, (4 *John. Rep.* 493,) a landlord was let in to defend after judgment against the casual ejector. At the time of being so admitted, he petitioned for the removal of the cause, being an alien. The order was made, *SPENCER*, J., dissenting, on the ground that there was no suit against him within the act of congress. It was technically against *John Styles*, and substantially against the tenant in possession.

In *Redmond* agt. *Russell*, (12 *John. Rep.* 153,) it was held that the petition should be filed at the time of putting in special bail. This had been done on the third of September, and notice of the defendant's intention to apply at the next term was served on the 6th, with a copy of the petition. The petition was not filed until the term of the application. It was held to be too late. *THOMPSON* and *VAN NESS*, JJ., dissented. Chief Justice *SPENCER* observes, that it was not a case in which the comity of the court is to be exercised. If the defendant is not strictly entitled to have his cause removed, we are bound to maintain our jurisdiction. The plaintiff has as strong a claim to have his cause retained here, as the defendant can have to remove it. Whenever that is done, which, according to the practice of the state court, amounts to an appearance in that

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court, then the petition must be filed. The requirement was intended not only to put the defendant to a prompt election, but to give the opposite party early notice of his intention. THOMPSON, J., thought that the appearance was to be one in open court.

In *Livingston agt. Gibbons*, (4 Johns. C. R. 94,) the case was this: The defendant, Gibbons, was served with a copy of a bill of complaint, and notice of a motion for an injunction. He appeared by counsel, and produced an answer duly sworn to, and subscribed by counsel. This was not allowed to be used as an answer, but was as an affidavit. It was used and filed as a defence to the motion. The Chancellor held that this was such an appearance as precluded him from subsequently removing the cause. He had submitted to the consideration of the state court the merits of the case, in part, at least.

The Chancellor said that the question was, whether the defendant had not elected his tribunal, and submitted to the jurisdiction? He was to be considered as having appeared on the record of the court. He adverted to the practice in chancery of an appearance with the register. The case of *Attorney-General agt. Pearson*, (7 Simons, 302,) furnishes an example of such an appearance.

Notwithstanding the cases before referred to, of a notice of retainer, or of a motion being equivalent to an appearance, it has been expressly decided by the supreme court, that a mere notice of retainer, and notice of a motion to set aside a *capias*, was not such an appearance as would prevent a removal. (*Norton agt. Hayes*, 4 Denio, 245.) The defendant did not endorse his appearance on the *capias* or give bail, but the writ was returned served. Notice of retainer was given on the 1st of December, and on the 23d an appearance was entered with the clerk, and the bond and petition was filed.

In *Field agt. Blair*, (Code Rep. N. S. 292, 361,) the defendant gave notice of his appearance on the 8th of December, and demanded a copy of the complaint. On the 24th he caused notice of appearance to be filed with the clerk, and presented his petition. This was held to be in time. Justice MICHELL

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said, that the entering an appearance was not an act between the attorneys merely, but is between the defendant and the court. The seventh rule of the court is also criticised and explained.

Without attempting to question these decisions, or to say they do not appear entirely consistent with the authorities before cited, the distinction between them and the present case is manifest and broad. The defendants' act was an open one, *between them and the court.*

The views taken by Justice SPENCER and Chancellor KENT, in the cases cited, are consistent with decisions or opinions expressed in the supreme court of the United States. Thus, Mr. Justice CATON, in the case of *Randle* agt. *The Delaware & Raritan Company*, (14 Howard, 80,) where he speaks of the injustice of citizens of another state being forced into the state courts, as tending to deprive them of the benefits of the constitution, speaks of it as being done without the power of election. And Mr. Justice GRIER, in *Marshall* agt. *The Baltimore & Ohio Railroad Company*, (16 Howard, 329,) while he condemns the interpretation of the act as if it were a penal statute, to be construed by its very letter, without regard to its meaning and spirit, yet speaks of it as conferring a privilege, and that the *right of choosing* an impartial tribunal is a privilege of no small practical importance.

All these authorities show that the question is, whether the appearance of the defendant has been an act importing that he submits the determination of a material question of his case to the judgment of the court. It appears to us that few acts can be more conclusive than an appearance by counsel in open court, upon the argument of a motion for injunction, the reading of affidavits to oppose it, the indorsement of such affidavits with the names of attorneys, and the recital of all this in an order of the court. And, especially, when this appearance and this resistance is to decide the chief, if not the only point of controversy in the cause.

The order appealed from must be affirmed, with costs.

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SUPREME COURT.

URIAH J. SMITH and others agt. THE METROPOLITAN GAS-LIGHT COMPANY and others.

An action to annul the charter of a *corporation* of this state must be brought by the *attorney-general* in the name of The People, in the mode required by the statute. (*Code*, § 430 *et seq.*)

An action brought by a number of individuals, as *tax-payers* and *corporators* of the city, against an incorporated company, to restrain them from exercising a privilege under their charter, on the ground that the privilege was a valuable one, belonging to, and *vested* in the city; and that other interests of the city at large would be affected by the use of such privilege,

Held, that the *corporate authority* itself, not the individual tax-payers, was the proper party to represent those interests of the city; and the proper party to cause steps to be taken to enjoin the defendants, if the interests of the city so required.

Tax-payers, as such, have been permitted to intervene, in cases where the corporate authority have, in violation of their duty as *guardians* and *trustees* of the private property of the city, attempted to squander or otherwise illegally dispose of such property. And the intervention of tax-payers in that class of cases has been sustained upon the same general principles which permits any *cestui que trust* to restrain the trustee from squandering the trust-property.

The corporation of the city of New-York have an undoubted right to give permission to the Metropolitan Gas-Light Company, the defendants, to lay down pipes beneath the surface of the streets, as a means of furnishing the citizens with an increased supply of gas.

Nor are they obliged to *sell* such permission, or treat it as a part of the city property, which is to be used for purposes of city revenue.

This power to authorize the laying down of gas-pipes, is, in no true sense of the word, a part of the city property, to which the corporate authority of the city is to resort for purposes of revenue.

New-York Special Term, Oct., 1855.

On the 17th of April last, by special act of the legislature, the Metropolitan Gas-Light Company was incorporated, with authority to manufacture gas for lighting the streets of this city. The act inhibits the company from digging in the streets to lay down pipes, or for any other purpose, without first obtaining permission of "*the two boards of the common council*," which two boards are, by the act, "authorized to grant and vest ex-

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clusive permission and authority to and in such company, for said purposes, to such extent and under such regulations as to them shall seem expedient;" but not to affect or impair any exclusive rights or privileges vested in any other company in the city.

Proceeding under this act, the board of councilmen have passed resolutions authorizing this company to lay their pipes through the streets, &c., under the same restrictions as have heretofore been applied to the Manhattan and New-York Gas-Light Companies; but providing that such permission shall not be construed as granting to said company any sole or exclusive right or privilege, or to prevent the common council from granting the like privilege to any other company.

The plaintiffs, as corporators and tax-payers of this city, have filed this bill, seeking to restrain this company perpetually from doing any act under their charter; and to restrain the individuals composing the board of aldermen from joining with the board of councilmen in granting such permission. A temporary injunction of that character having been granted, the Metropolitan Gas-Light Company now move to dissolve it.

A. J. WILLARD & CHARLES O'CONOR, *for motion.*

WALDO HUTCHINS & E. W. STOUGHTON, *opposed.*

COWLES, Justice. The plaintiffs charge that the act of incorporation is void; that they are tax-payers and corporators of the city; that the fee of the streets has vested in the corporation; that the right to grant permission to lay down pipes is in the corporation; that such right and privilege is of great value, and if judiciously sold or disposed of would realize to the city a very large pecuniary benefit; and that, in various ways, the corporation of New-York would sustain injury from granting to this company the right to lay down their pipes.

Upon these grounds these plaintiffs, as tax-payers and corporators, claim the right to intervene, and as such, and of their own motion, by aid of the court, to restrain the defendants. I am unable to discover any grounds upon which the plaintiffs

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can sustain this suit. If its object is to annul the charter of the company—and the temporary injunction restrains it from exercising any of its franchises—that can only be done by the attorney-general in the name of the people in the mode required by the statute. (*Code, § 430, et seq.*)

If claimed to be sustained on the ground that this is a grant of a valuable privilege belonging to and vested in the city, and that other interests of the city at large would be affected by the laying down of these pipes, the answer is, that the corporate authority itself, not the individual tax-payers, is the proper party to represent these interests of the city. Tax-payers, as such, have been permitted to intervene in cases where the corporate authority have, in violation of their duty as guardians and trustees of the private property of the city, attempted to squander or otherwise illegally dispose of such property, and the intervention of tax-payers in that class of cases has been sustained upon the same general principles which permits any *cestui que trust* to restrain the trustee from squandering the trust-property.

But that is not the case here. The corporate authority of this city have an undoubted right to give permission to these defendants to lay down pipes beneath the surface of the streets, as a means of furnishing the citizens with an increased supply of gas.

Nor are they obliged to sell such permission, or treat it as a part of the city property, which is to be used for purposes of city revenue.

I have had occasion recently, in the case of *Whitmore and others* agt. *Strong and others*, to discuss the question, whether a similar power to regulate streets is to be treated as city property, with a view to city revenue? and a suggestion that the power to authorize gas-pipes to be laid, with a view to the promotion of the public convenience and comfort, is property which, under the charter of 1853, must be sold at auction, as it must be if it is city property, only tends still further to confirm me in the conclusions at which I arrived in that case.

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This power to authorize the laying down of gas-pipes is, in no true sense of the word, a part of the city property, to which the corporate authorities of the city is to resort for the purposes of revenue. Whether, therefore, the permission to lay down these pipes is given by the joint consent of the mayor and common council, or by the *two boards alone*, there is here no squandering or illegal disposition of the private property of the city, which, upon any recognized principle, can justify a suit of this character by tax-payers of the city, as such.

Nor is there any other ground on which this suit can be sustained by these plaintiffs as tax-payers.

It is alleged that if this Metropolitan Gas-Light Company is allowed to go on, they must take up the Russ pavement in Broadway, which could not be again as durably relaid; and that in a variety of other ways the public interests would be made to suffer. To all this the answer is, that the corporate authority of the city is the proper guardian and protector of these city interests, and the proper party to cause steps to be taken to enjoin the defendants if the interests of the city so require.

As these plaintiffs have no standing in court which can enable them to sustain this action, it is entirely unnecessary to discuss the various questions that have been raised respecting the alleged unconstitutionality of the defendants' act of incorporation, and I therefore pass them over.

But it is urged that if the injunction is dissolved as to the Metropolitan Gas-Light Company, it should be retained as to the other defendants, (the corporation of the city and the aldermen,) inasmuch as they, not having appeared in the suit, cannot ask to have the injunction dissolved as to themselves.

It must be observed that the corporation and aldermen are not alone interested in that question. This company have no powers to proceed until the permission of the two boards of the common council is obtained.

The restraint upon the aldermen is a restraint upon the gas-light company.

To hold the injunction as to the aldermen is, in effect, to hold it against the gas-light company also.

Laning agt. Carpenter and others.

To pretend to dissolve it as to the gas-light company, but continue it as to the aldermen, would be mere mockery.

An order must be made that the injunction, as to all of the defendants, be dissolved.

Costs to abide the event of the suit.

SUPREME COURT.

DANIEL LANING agt. JOHN CARPENTER and others.

Until the legislature shall annex "*Schuyler County*" to some judicial district, and provide for the exercise of the ordinary powers of the supreme court therein, separately and distinctly, as in other counties, the inhabitants of that territory must be held to belong to their *original* counties—(Chemung, Steuben and Tompkins;) and the act organizing this county must be deemed utterly inoperative, so far as relates to the supreme court, circuit courts, and courts of oyer and terminer.

A *judgment*, therefore, docketed in the clerk's office of Schuyler county, is *void* and of no effect.

Steuben Special Term, Feb., 1856.

MOTION to dissolve injunction.

D. J. SUNDERLIN, *for plaintiffs.*

ROBERT CAMPBELL, JR., *for defendants.*

E. DARWIN SMITH, Justice. The plaintiff's title to maintain this suit and retain the injunction allowed, depends upon the validity of his judgment. The judgment was entered up by confession, and docketed in the clerk's office of Schuyler county.

The 6th section of the act organizing this county (*Chap. 386 of Sess. Laws of 1854*, p. 913) declares that the territory composing such county shall be known and distinguished as the county of Schuyler, "excepting for the election of members of the legislature and justices of the supreme court, and for the holding and jurisdiction of the supreme and circuit courts, and courts of oyer and terminer, until after the next state census, or enumeration."

Laning agt. Carpenter and others.

If there be any force in this exception, and it was most obviously quite essential, to give the color of constitutionality to the act, it saves the act from having any legal effect, so far as relates to the power and jurisdiction of this court over the territory embraced in the limits of the proposed new county, or the inhabitants thereof, until after the next apportionment. The jurisdiction of this court remains, and is to be exercised in the same manner, and by the same officers, as if this act had never passed. The process of this court, in respect to the inhabitants of the territory embraced in the limits of the proposed new county, is to go to the sheriffs of Chemung, Steuben and Tompkins counties, precisely as before the passage of this act. Judgments docketed in these counties of course are liens throughout the whole of the original respective counties. The jurisdiction of this court over that territory must be exercised exclusively in this way; and it cannot be that judgments can be docketed in the clerk's office of Schuyler county, likewise to be liens, and to be enforced by execution, to the sheriff of that county. The fact that no venire can be laid or trial had in actions in this court in that county, seems to imply, so far as this court is concerned, that no judgment can be docketed there, for every judgment must have a venue, or presupposes a place of trial.

Until the legislature shall annex Schuyler county to some judicial district, and provide for the exercise of the ordinary powers of this court therein, separately and distinctly, as in other counties, the inhabitants of this territory, as they cannot be placed without the protection of this court, or exempted from its jurisdiction, must be held to belong to their original counties; and the act organizing this county must be deemed utterly inoperative, so far as relates to this court, circuit courts and courts of oyer and terminer.

The plaintiff's judgment is entirely void, and the injunction in this action must, therefore, be dissolved, and his bill dismissed.

Ward & Ward agt. Dewey & wife, and Eleanor Ward.

SUPREME COURT.

CORNELIUS S. WARD and JOEL WARD agt. ELIAS DEWEY and MARY his wife, and ELEANOR WARD.

An action cannot regularly be brought to trial, until it is in such a situation that a *final judgment* can be rendered between *all the parties*. It cannot be tried in *sections*, without leave of the court.

Nor, where an action is at issue, as against all of several defendants, can any *one* of them give notice of trial, and upon the failure of the plaintiff to appear, take a judgment against him by default.

The cause must not only be in readiness for trial as between all the parties to the action, but it must also have been noticed for trial by all the defendants who have a right to appear on the trial and move for judgment against the plaintiff. Where the cause has not been noticed for trial by the plaintiff, and but one of several defendants who has appeared and answered has noticed it, no effectual trial can be had. Of course, the plaintiff cannot be forced to trial in such a case.

If there be several defendants who are each entitled to notice of trial, *all* must have notice before the plaintiff can move on the trial. On the other hand, all the defendants must have given notice of trial to the plaintiff before any of them can move the trial as against the plaintiff.

If a plaintiff fail to prosecute his action against several defendants with diligence, *one* of such defendants may, in a proper case, and upon motion for that purpose, have the action dismissed as against him, leaving it to stand against the other defendants. In such case, a notice of trial will be of no avail, unless given by all the defendants who are parties to the issues to be tried.

Where the defendant alleges in his answer that "there is another action now pending between the same parties for the same identical cause of action mentioned in the complaint in this action," it is sufficiently *definite* and *certain*.

Albany Special Term, Nov., 1854.

MOTION to set aside order dismissing complaint, &c.

The summons and complaint were served on the defendants, Dewey and wife, on the 2d of September, 1854, and on the defendant, Eleanor Ward, on the 9th day of the same month. On the 7th of September, the attorney for the defendant, Elias Dewey, served upon the plaintiffs' attorney an answer and a notice of trial for the Schoharie circuit, to be held on the third Monday of the same month. On the 19th of September, the

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cause having been reached upon the calendar, the counsel for the defendant, Dewey, moved for, and obtained an order dismissing the complaint, no one appearing for the plaintiffs.

The action was brought for the partition of land. The defendant, Dewey, in his answer, set up, by way of defence, that, prior to the commencement of this action, he had commenced an action in this court against the plaintiffs *and others* for the partition of the same lands mentioned and described in the complaint in this action, and that a summons and complaint had been personally served on the plaintiffs, Cornelius Ward and Joel Ward, and the other defendants named therein.

On the 13th of September, the plaintiffs' attorney gave notice to the attorney of Dewey that he would move, at the special term to be held at Albany on the last Monday of October, for an order requiring the answer to be made more definite and certain, by naming all the parties, plaintiff and defendant, in the former action.

At the October special term, an order was made directing that the motion stand over until the November special term, at which term the plaintiffs' counsel also moved to set aside the order dismissing the complaint. The motions were argued together.

LYMAN TREMAIN, *for plaintiffs.*

JAMES E. DEWEY, *for defendant, Dewey.*

HARRIS, Justice. The notice of trial by the defendant, Dewey, was premature, and the order dismissing the complaint as to him was irregular. The cause was not ready for trial. The time for Mrs. Ward to answer had not yet expired. Indeed, twenty days had not yet elapsed since the service of the summons and complaint on the defendant, Dewey. If the plaintiffs, when the cause was reached upon the calendar, had appeared and offered to try it, they would not have been permitted to do so. If the cause had been noticed for trial by the plaintiffs, they could not have brought it to trial, for the reason that it was only in readiness for hearing as against one of the

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defendants, Mrs. Ward; and even Mrs. Dewey might yet answer the complaint.

An action cannot regularly be brought to trial until it is in such a situation that a final judgment can be rendered between all the parties. It cannot be tried in *sections*, without leave of the court. If the ends of justice require that there should be a separate trial between the plaintiff and one of several defendants, application must be made to the court for an order directing such a trial. Upon such an application, the court may, if it see fit so to do, direct that separate trials be had between the several parties to the action.

Nor do I understand that where an action is at issue, as against all of several defendants, any one of them may give notice of trial, and, upon the failure of the plaintiff to appear, take a judgment against him by default. The cause must not only be in readiness for trial as between all the parties to the action, but it must also have been noticed for trial by all the defendants who have a right to appear on the trial. Where the cause has not been noticed for trial by the plaintiff, and but one of several defendants who has appeared and answered has noticed it, no effectual trial can be had. Of course, the plaintiff cannot be forced to trial in such a case. The term "either party," as used in the 256th and 258th sections of the Code, is to be construed in reference to the subject-matter to which the provisions of these sections relate, which is, the trial of the issues which have been joined in the action. When it is said that "either party may give notice of trial," it is intended that the notice which shall give the right to bring on the trial of the action must be given by one or the other of the parties to all the issues triable at the same time. If there be several defendants, who are each entitled to notice of trial, all must have notice before the plaintiff can move on the trial. On the other hand, all the defendants must have given notice of trial to the plaintiff before any of them can move the trial as against the plaintiff. If a plaintiff fail to prosecute his action against several defendants with diligence, one of such defendants may, in a proper case, and upon motion for that purpose,

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have the action dismissed as against him, leaving it to stand against the other defendants. In such a case, a notice of trial will be of no avail, unless given by all the defendants who are parties to the issues to be tried. (*See Burnham agt. De Bevoise, 8 How. 159.*)

The other motion must be denied. A party is authorized, when the allegations of a pleading are so indefinite and uncertain that the precise nature of the charge or defence is not apparent, to apply for an order requiring the pleading to be amended, so as to make it definite and certain. This is not such a case. A party is allowed to demur to a complaint, when it appears upon its face that there is another action pending between the same parties for the same cause; and when the fact exists, but does not appear on the face of the complaint, the objection may be taken by answer.

The defendant has availed himself of this provision of the Code. He alleges, in his answer, that "there is another action now pending between the same parties for the same identical cause of action mentioned in the complaint in this action." This was all he was required to do. Such an answer is neither indefinite nor uncertain. It plainly indicates the precise nature of the defence relied upon by the defendant. It is true, that, in this case, the defendant, in his answer, has gone on to state that he is himself the plaintiff in the prior action, and that the plaintiffs in this action, together with other persons not named, are the defendants in that action. This it was unnecessary for him to do. Having alleged the fact that a prior action was pending between the same parties, and for the same cause, he would be obliged to prove the allegation upon the trial, in order to sustain his defence, but he could not be required to state, more explicitly, in his answer, the proof he expected to furnish.

As each party has succeeded upon one motion, the costs may be considered as balanced. No order need be made on that subject.

Cady, President, &c., agt. Edmonds and others.

SUPREME COURT.

DANIEL CADY, President of the Oneida Central Bank, agt.
JOHN EDMONDS and others.

The giving *bail* to the *sheriff*, by the defendant, to procure his discharge from immediate custody, does not estop him from subsequently questioning the right of the plaintiff to the *order of arrest*.

By § 204 of the Code, the motion to discharge the order of arrest may be made at any time before the justification of bail. This justification is that provided by §§ 193 *et seq.*, and has no reference to an acceptance of the bail by the plaintiff, in discharge of the liability of the sheriff, by an omission to except. The decision in 1 *Duer*, 645, that the defendant is not precluded from moving, by a *judgment* in the action, if bail have not justified, approved.

If the Code does not restrict the right of the party to move to the time, during which the proceedings in the action are *in fieri*, then there is no limit to that right.

Frauds are various, and diversified in character and circumstances; and the plaintiff, in making application for an order of arrest, must specify and establish the *particular fraud* relied upon as the foundation of the order.

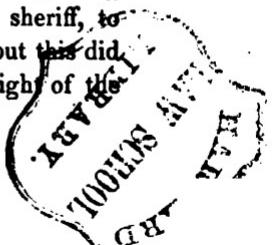
The plaintiff cannot, under the 205th section of the Code, set up a ground for retaining the order of arrest not put forth as the original ground of the order.

Oneida Special Term, March, 1855.

MOTION to discharge or vacate order of arrest, made by special county judge of Oneida county.

PHILO GRIDLEY and JOSEPH BENEDICT, *for motion.*
FROST & SPRIGGS, *opposed.*

W. F. ALLEN, Justice. It is objected, on the part of the plaintiff, that the defendants' cannot now move to vacate the order of arrest, for the reason that judgment has been perfected, and they have been charged in execution. But they have taken no steps in the cause since their arrest, affirming or recognizing the validity of the order. They gave bail to the sheriff, to procure their discharge from immediate custody; but this did not estop them from subsequently questioning the right of the



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plaintiff to the order of arrest. The only restriction to the right of the defendants to move to discharge the order is that provided by § 204 of the Code, which provides that the motion may be made at any time before the justification of the bail. This justification is that provided by §§ 193 *et seq.*, after an exception by plaintiffs pursuant to § 192, and has no reference to an acceptance of the bail by the plaintiff in discharge of the liability of the sheriff by an omission to except.

The superior court of the city of New-York have decided, at general term, (1 *Duer*, 645,) that the defendants are not precluded from moving, by a judgment, in the action, if bail have not justified; and with this decision I am satisfied.

The justification of the bail under the Code is made to take the place of putting in and perfecting bail under the former practice, as to its effect upon the rights of the parties arrested. Their laches did not deprive the defendant of his right to move, but action on his part, directly affirming the validity of the order and the legality of the arrest, was held, under the former practice, to estop the party from contesting the regularity or validity of the proceedings for his arrest; and the same effect is given to similar proceedings under the Code.

If a recovery of the judgment does not affect the rights of the parties, and render the order irrevocable, there is no reason why any other of the plaintiff's acts without any assent or act on the part of the defendants, should have that effect. If the Code does not restrict the right of the party to move to the time during which the proceedings in the action are *in fieri*, then there is no limit to that right. The effect of vacating the order of arrest, upon the execution already issued against and executed upon the person of the defendant, is not involved in the decision of this motion.

That question embraces other considerations which were not discussed upon this motion, and did not properly arise.

Among the grounds upon which an order for the arrest of a defendant, in an action upon a contract, may be made, is, that the defendant has been guilty of a fraud in contracting the debt, or incurring the obligation for which the action is brought.

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(*Code*, 179, sub. 4.) Frauds are various, and diversified in character and circumstances; and the plaintiff, in making application for an order of arrest, must specify and establish the particular fraud relied upon as the foundation of the order.

The specific fraud put forth in the affidavit upon which the order in this action is based, consisted in the alleged false and fraudulent representations of the defendants, as to their pecuniary circumstances at the time of contracting the debt upon which the suit is brought.

The defendants contradict, and in their affidavits deny, the alleged representations; and the plaintiffs, in the affidavits in reply, do not claim that the representations and statements relied upon were made at the time the paper in suit was presented for discount, and discounted by them.

The affidavits would rather tend to deny circumstances from which a general fraudulent intent might be inferred, and these circumstances the defendants have had no opportunity to answer or explain.

The plaintiff cannot, under the 205th section of the Code, set up a ground for retaining the order of arrest, not put forth as the original ground of the order; and I must, therefore, lay out of view many, if not most of the circumstances principally relied upon by the counsel for the plaintiff to support the proceedings.

If the facts are true, and do, as claimed by the plaintiff, establish the fact that the debt was fraudulently contracted, any order I may make will not deprive him of his appropriate remedy; but it is too late to use them as the groundwork of an order of arrest in the action.

The motion must be granted.

Cobb agt. Lackey & Brandon.

SUPERIOR COURT.

COBB agt. LACKY & BRANDON.

Ex parte orders may be granted by any judge of the court, wherever he may be found, within the territorial limits in which he is authorized to do official acts.

Motions upon notice, or orders to show cause, can be moved in *vacation* in the absence of the adverse party, only before the justice who sits at chambers, on the day for which the notice is given, or the order to show cause is returnable. Defaults for not making such motions can be moved before such justice only. Chambers, during *vacation*, is regularly held in the *general term room*.

During *term time*, motions on notice, and orders to show cause, in the absence of the opposing attorney or counsel, can be moved only before the justice who holds the *special term*. Motions to discharge such notices, or orders to show cause, on account of the default of the party serving them to bring them on, can be made before such justice only.

When the attorneys or counsel of both parties attend, they may be heard before any judge of the court who is disengaged.

But there is but one place where defaults can be taken, on the failure of the attorney, serving a notice or order to show cause, to bring on his motion, or on the failure of the attorney, on whom it is served, to appear and oppose.

At Chambers, September 22, 1855.

This action was commenced by the service of a summons, which stated that a complaint would be filed, and where. The defendants appeared separately, by different attorneys, who gave notice of retainer, but did not, within twenty days after service of the summons, demand, in writing, a copy of the complaint.

After the twenty days, they demanded a copy of the complaint, and none having been served, they severally obtained an order requiring the plaintiff to show cause on the 13th instant, why the action should not be dismissed, on account of the plaintiff's omission to serve a copy of the complaint on the defendant's attorney. The 13th was in vacation, and Mr. Justice BOSWORTH then sat at chambers, in the general term room.

The plaintiff's counsel attended to show cause, and after

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waiting until twenty minutes past ten, moved Justice **BOSWORTH** to dismiss the orders, which he declined doing then, as defendants' attorneys might soon appear.

About half-past ten, there being a large number in attendance, Justice **BOSWORTH** remarked that Justice **HOFFMAN** was in the judge's library, and would hear any motions that counsel chose to argue before him.

- Mr. Lossing, a clerk in the office of the defendants' attorneys, who was present with their papers, understanding that this remark was a permission to move for defaults, as well as to move motions where the counsel of both parties were present, went before Justice **HOFFMAN**, and had orders dismissing the complaint granted by default.

Before granting the orders, Judge **HOFFMAN** directed the cause to be called by its title in the room in which Judge **BOSWORTH** was sitting, which was done, but was not heard by plaintiff's counsel, who was there waiting the appearance of defendants' attorneys, and understanding that that was the only room in which defaults could be taken—and who did not know, or did not recognize Mr. Lossing.

About ten minutes before eleven, the plaintiff's counsel again applied to Judge **BOSWORTH** to dismiss the two orders to show cause, by reason of the default of defendants' attorneys to appear and bring on the motions. The judge told the counsel to draw the orders, and he would sign a direction to the clerk to enter them.

While the orders were being drawn, Judge **BOSWORTH** went to another room to hear a concluding argument on a litigated motion commenced on the previous day, and adjourned to the 13th at 11 A. M. On his leaving, Chief Justice **OAKLEY** took his place at chambers; and when plaintiff's counsel had drawn his orders, the chief justice signed a direction to the clerk of the court, to enter them.

The plaintiff now moves to set aside the two orders granted by Justice **HOFFMAN**, for irregularity. There was some conflict in the affidavits upon the point, whether the orders granted by

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Judge HOFFMAN were, in fact, granted on the 13th of September.

HORATIO P. ALLEN, *for plaintiff.*

CHARLES W. SANDFORD, *for defendants.*

BOSWORTH, Justice. The plaintiff moves to discharge two orders for *irregularity*. I have no doubt that the orders granted by Justice HOFFMAN on defendants' motion, and the two granted by Chief Justice OAKLEY, on plaintiff's motion, were granted on the 18th of September. There is no doubt that it was regular for the plaintiff to apply to the chief justice, and that it was not his duty to have gone into the room where Justice HOFFMAN was sitting, to avoid the possibility of being defaulted there. It is quite probable, if the case had been called publicly when plaintiff's counsel applied to Justice BOSWORTH for the orders subsequently granted by Chief Justice OAKLEY, that all difficulty would have been obviated.

I have no doubt that Mr. Lossing supposed that those applying for orders on default of the opposite party to appear, might as properly go before Justice HOFFMAN, as attorneys whose adversaries were present and accompanied them. Justice HOFFMAN, I presume, would not have granted the orders which he did grant, had he not understood that the motions had been publicly called in the general term room, and that the justice sitting there, on account of being fully occupied, desired that he should see that the order to be entered was one justified by the notice of it, and that there was proper evidence of due service of it.

In vacation, the only justice before whom orders by default can be properly taken, is the one sitting in chambers for the purpose of hearing motions.

In term time, such defaults can only be granted by the justice holding the special term in the room which he occupies for such business.

When counsel of both parties attend, they, as well as counsel applying for *ex parte* orders, may go before any justice who may be in attendance at any of the rooms of the court.

Miller agt. Garling.

I think the two orders granted by Justice HOFFMAN should be vacated, but without costs, and on condition that plaintiff stipulate to vacate the orders granted by Chief Justice OAKLEY, and attend upon the orders to show cause which were returnable on the 13th instant, to the end that a hearing may be had thereon on such day as the counsel may name, or if they do not agree in relation thereto, as the court may designate.

NOTE.—This case is reported in order that the profession may be advised of the practice of the superior court, as to granting motions by default. Although the practice is uniform, it does not seem to be well understood, and much confusion results, which might be avoided, if it was borne in mind.

SUPREME COURT.

MICHAEL MILLER agt. PHILIP GARLING.

In an action for the recovery of the possession of a heifer, which was secretly taken from the possession of the plaintiff by the defendant, damages are recoverable for time spent and expenses incurred by the plaintiff in searching for the heifer, after she was taken by the defendant.

Where the plaintiff had not claimed such damages in his complaint, he was allowed to amend the same on the trial without terms, by inserting therein allegations to entitle him to such damages, the defendant not being able to show he had any absent witness material to the claim for such damages.

Madison Circuit, February, 1856.

BALCOM, Justice, presiding.

This action was brought to recover the possession of a heifer. There was evidence tending to show the defendant secretly took the heifer from the plaintiff's possession. The plaintiff offered to prove, on the trial, that he and his servants spent several days in searching for the heifer, after she was taken by the defendant, before he found her, as part of the damages he sustained by reason of the taking and detention of the heifer by the defendant.

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The defendant objected to the evidence on the ground that no such special damages were claimed in the complaint.

DUANE BROWN, *for plaintiff.*

M. J. SHOECRAFT, *for defendant.*

BALCOM, Justice, overruled the objection, and gave the plaintiff leave to amend his complaint on the trial, by inserting a claim for such special damages. (*Bennett agt. Lockwood*, 20 *Wend.* 223.)

The defendant's counsel objected to the amendment, and claimed the defendant was not then prepared to meet such evidence. The judge remarked that the defendant must show he had some absent witness material to the claim for the special damages, before he would refuse to allow the plaintiff to amend his complaint, but no such proof was made, and the amendment was allowed without terms.

SUPREME COURT.

THE PEOPLE *ex rel.* MICAH BALDWIN agt. THE BOARD OF SUPERVISORS OF LIVINGSTON COUNTY.

It is the duty of boards of supervisors "to examine, settle and allow all accounts chargeable against their respective counties." And the proper discharge of this duty involves the exercise of *judicial functions*—the receiving of evidence, the hearing, considering and determining in respect to the justice and legality of each and every claim presented for allowance.

Where the relator as marshal, appointed under the act of March 12, 1855, and the supplemental act of April 6, 1855, to take the census, presented to the board of supervisors of Livingston county his account against the county for fifty-nine days' services as such marshal, at \$2 per day, and the board audited and allowed his account for forty days' services at \$2 per day,

Held, it appearing that the marshal, under said acts, was entitled to receive \$2 for each day he was *actually* and *necessarily employed*, to be audited and allowed, &c., and no directions in the acts as to how the accounts should be made out; that his claim stood upon the same footing with all other accounts against the county; and the board, having ascertained, found and determined

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that he was not *actually* and *necessarily employed* fifty-nine days, but only forty days, the decision was a judicial determination, of which it was not the office of a *mandamus* to bring up for review.

Livingston Special Term, Feb., 1856.

MANDAMUS.

THE relator in this proceeding was duly appointed under the act of March 12, 1855, a marshal to take the census in and for the town of Lima, in said county of Livingston; and for the service rendered under the supplemental act, passed April 6, 1855, became entitled to be paid the sum of two dollars per day for the time actually expended.

The writ of mandamus states, that he was actually and necessarily employed in the discharge of his duties, as such marshal, in taking the census and enumeration of the inhabitants of the said town of Lima, fifty-nine days; and that he presented his account, made out and verified as required by law, for the services so rendered, to the board of supervisors of said county, that the same might be audited, allowed, assessed and collected, pursuant to the provisions of the aforesaid mentioned act; and that the said board of supervisors had refused to audit and allow said account.

To the alternative writ of mandamus allowed in the cause, the board of supervisors returned: That the said relator duly presented to the said board his claim of fifty-nine days' service, under the act, as marshal of the said town of Lima; that the said board, pursuant to the statute, did proceed to examine, settle and allow said account; and did examine, settle, audit and allow the same; that upon such examination and settlement, the said board ascertained and believed, found and determined, that the said relator was not actually and necessarily employed as such marshal, under and by virtue of said act, fifty-nine days; and in like manner ascertained and believed, found and determined, that the said relator was not so employed over forty days; and thereupon said board of supervisors audited and allowed said account of said relator at the sum of eighty dollars, pursuant to the statute and their power and duties in that behalf; and said board of supervisors

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say that they have not refused to audit and allow the account of the said relator for the services rendered by him, as such marshal aforesaid.

Upon the writs of mandamus and returns, in this and twelve other like cases, counsel for the relator moved for writs of peremptory mandamus.

JAMES WOOD, JR., *for relators.*

SCOTT LORD, *for supervisors.*

E. DARWIN SMITH, Justice. By the 18th section of the act providing for taking the census of March 12th, 1855, the accounts for the services of the marshal, performed under said act, were to be audited by the supervisors of the county where the services were performed, and assessed, collected and paid as part of the contingent expenses of the county ; and by the supplemental act of April 6th, each marshal was entitled to receive two dollars for each day he was *actually* and *necessarily employed*, to be audited and allowed as aforesaid.

Neither of these acts directs how the accounts of the marshal shall be made out, verified, or proved, and they are, therefore, necessarily governed by the general provisions of law regulating accounts presented to boards of supervisors in 1 Rev. Stat. 4th ed. 680, §§ 26 and 27.

The relator's claim stands upon the same footing with all other accounts against the county, required to be audited by the board of supervisors, which may be allowed in whole or in part, or disallowed, notwithstanding the verification thereof.

It is the duty of boards of supervisors "to examine, settle and allow all accounts chargeable against their respective counties."

The proper discharge of this duty involves the exercise of judicial functions, the receiving of evidence, the hearing, considering and determining in respect to the justice and legality of each and every claim presented for allowance. The relator presented to the respondents a claim against the county of Livingston for fifty-nine days' services. He was entitled to be

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be paid two dollars per day "for each day he was *actually* and *necessarily employed*." How many days he actually and necessarily spent in the discharge of his duties as marshal was a question which the respondents were necessarily called upon to ascertain, determine and decide, before they could legally pay his account. When that question was decided, the law fixed the amount of his compensation at two dollars per day for each day's service.

The duty to "examine, settle and allow" his account was practically discharged when they had ascertained and determined the number of days he was *actually* and *necessarily employed*, and could not be properly performed without examining and considering that point.

The respondents say, in their return, that they did proceed to examine, settle and allow the relator's account; that, upon such examination and settlement, they ascertained, believed, found and determined, that the relator was not *actually* and *necessarily employed* as such marshal fifty-nine days, but was so employed forty days, and no more; and that they had audited and allowed his account at eighty dollars. This is in the nature of a judicial determination.

Such determinations of inferior officers, or of subordinate tribunals, it is not the office of the writ of mandamus to bring up for review in this court. If the respondents had refused to examine, audit and allow said account, this court, by the writ of mandamus, would require them to do so. But the respondents have not refused to audit the account: they have only exercised their discretion as to the extent of the allowance, not in regard to the rate of compensation, but in regard to the time for which the county should be charged. In such cases a mandamus will not lie. (*The People agt. The Supervisors of New-York*, 1 *Hill*, 367; *The People agt. The Supervisors of Albany*, 12 *John.* 414; *Hull agt. The Supervisors of Oneida*, 19 *id.* 259; *People agt. Supervisors of Dutchess*, 9 *Wend.* 508.)

If the supervisors have erroneously disallowed the nineteen days, the relator can have no relief by mandamus. This court is not so destitute of business that it will be likely soon, if ever,

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to attempt drawing to itself the work of investigating the accounts and claims presented to the various boards of supervisors in the state, that it may review their numerous decisions and adjudications on such claims.

The motion for peremptory writs of mandamus in these cases is denied, with leave to the relator to plead to the returns, or demur.

SUPREME COURT.

THOS. B. RIDDER, EDGAR M. CRAWFORD & FRANCIS PALMER
agt. WILLIAM WHITLOCK.

An action against a defendant, employed by the plaintiffs to sell goods as a pedler, and return to the plaintiffs the proceeds of the goods sold, with any goods not sold by him, wherein the contract of hiring is set out in the complaint, with allegations that the defendant had a portion of such goods and money, received for another portion thereof, belonging to the plaintiffs, which he neglected and refused to account for to the plaintiffs, but *converted the same to his own use*, is not an action arising on contract; the contract being only inducement to the action, while the *gravamen* of the complaint is the *conversion* of the goods and money by the defendant.

Had the allegations that the defendant *converted* the goods and money of the plaintiffs to his own use been left out of the complaint, the action would have been one on contract.

It will be presumed that the summons in an action, in the supreme court, is drawn before the complaint is framed, although the latter is served with the summons.

The summons must indicate the nature of the action, i. e., whether it is one arising on contract for the recovery of money only, or one in which the plaintiff will apply to the court for relief.

Where the cause of action stated in the complaint is different from that indicated by the summons—the latter showing the action was one on contract, and the former containing a cause of action for a tort—it was held the complaint should be set aside, although it was served with the summons.

This is analogous to the practice prior to the Code, where, if the plaintiff in declaring did not pursue the cause of action, as set forth in the *ac-*etiam** part of the *capias* by which the suit was commenced, the declaration, and not the *capias*, was set aside.

Where plaintiffs, in their complaint, so blend and mix together allegations perti-

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nent to two different causes of action, one *ex contractu*, and the other *ex delicto*, that it is uncertain from the complaint whether they will base their action on contract, or go solely for the tort at the trial, it was *held*, when the pleading was brought in question on a motion, that the complaint should be construed most unfavorably against the party making it.

A defendant may be arrested in an action for money received, or property embezzled, or fraudulently misappropriated, as an agent of the plaintiffs, or while he was acting for the plaintiffs in a fiduciary capacity—such as a pedler of goods for the plaintiffs—it is immaterial whether the facts authorizing the arrest are or are not inserted in the complaint; or whether the action is brought on the contract for not accounting for and paying over the goods and money to the plaintiffs; or in tort for the *conversion* of the goods and money.

In such a case, the plaintiffs may elect whether they will sue on the contract for refusing to account, or for the defendant's breach of duty, arising out of his employment for hire, and the *conversion* of the money and goods by the defendant to his own use.

Tompkins Special Term, Jan., 1856.

THE complaint in this action was served with the summons. The summons contained a notice, that if the defendant failed to answer the complaint within twenty days, &c., the plaintiffs would take judgment against the defendant for \$363.16, with interest thereon from the 30th day of July, 1855, besides costs.

The complaint states that the plaintiffs employed the defendant as a pedler, to take goods and merchandise, belonging to the plaintiffs, and sell and dispose of the same for the plaintiffs; the plaintiffs agreeing to pay the defendant a certain sum as a compensation for his services; that the defendant was charged, from time to time, with the goods taken by him, and credited, from time to time, with the goods unsold, which he returned to the plaintiffs, and with the notes and money he received for the goods which he delivered to the plaintiffs. That under this agreement the plaintiffs, at Ithaca, in the summer of 1855, delivered to the defendant goods at some ten or a dozen different times; and that the greater portion thereof the defendant sold and accounted for to the plaintiffs. That, finally, the defendant had, of said goods and merchandise, and in money and notes he received therefor, belonging to the plaintiffs, the sum and value of \$363.16, which the defendant, at certain times specified, *converted to his own use*, and had neglected and refused to

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account for and pay to the plaintiffs, although by them often requested so to do. Wherefore, the plaintiffs demanded that the defendant might be adjudged to pay the plaintiffs' *damages* to the sum of three hundred and sixty-three dollars and sixteen cents, with interest from the 30th day of July, 1855, besides costs.

The defendant now moves to dismiss the *proceedings* in this cause for irregularity: for that the summons concludes as if in an action upon contract, and the complaint is in an action not upon contract; and for such other or further order as to the court shall seem proper, with costs of the motion.

The plaintiffs' counsel insists that the complaint only states a cause of action on contract; but if the court should hold the contrary position he asks leave to amend the summons so it will conform to the complaint.

ALFRED A. WELLS, *for plaintiffs.*

WILLIAM BRUYN, *for defendant.*

BALCOM, Justice. By striking from the complaint the allegation that the defendant *converted to his own use* the goods, notes and money of the plaintiffs therein described, which he had neglected and refused to account for and pay to the plaintiffs, when by them requested so to do, the entire cause of action set forth might be regarded as *arising on contract*, and the complaint would conform to the summons, which contains the appropriate notice prescribed by *sub. 1* of § 129 of the Code. The form and language of the complaint would then be substantially like declarations in assumpsit under our former system of practice in actions against an agent employed to sell goods, and for not duly accounting for the goods, or for the moneys received by him. (*Chit. Pl. 7th Am. ed. from 6th London ed.*, vol. 2, pp. 341 and 344; also see *id. p. 335, id. p. 263; Yates Pl. 236.*)

While the charge of a *conversion* of the goods, notes and money by the defendant remains in the complaint, it is doubtful whether the gravamen of the action is not the conversion; and

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whether the action is not in substance *ex delicto*. If it can be considered as *ex delicto*, and arising from the conversion, then the contract stated in the complaint must be regarded as *inducement* only, to the real cause or gist of the action.

This is the construction put upon the complaint by the defendant's counsel; and there are decisions which countenance such a construction. "If the contract be laid as *inducement* only, it seems that case for an act, in its nature a tort or injury, afterwards committed in breach of the contract, may often be adopted. On this ground, case for not accounting for, and for *converting* to the defendant's use, bills delivered to him to be discounted, or the proceeds of such bills, is probably sustainable." (1 Chit. Pl. 154, ed. before cited; 6 East. 333.)

"And in *Mast* agt. *Goodson*, (3 Wils. 348,) it was held that a count *in case*, setting out an agreement by which the plaintiff was to build a yard in defendant's close, and lay out not less than £20, and was to enjoy it for life; and averring that defendant built the yard, and enjoyed it for some years as an easement, but defendant afterwards *wrongfully obstructed* him in the enjoyment of it, was good." "In that case," says *Chitty*, (1 Chit. Pl. 154,) "the action was founded on a contract; but the obstruction to the plaintiff's right for which the action was brought, was *ex delicto*, although the right also arose out of the contract."

As before stated, it is doubtful whether the breach of the contract in this case is set out as the gist of the action, or whether the conversion is not the real cause for which the action is brought. There can be no doubt but the plaintiffs had their election, either to base their action on the contract, alleging the neglect or refusal of the defendant to account for the goods, money and notes, and pay the same to the plaintiffs when requested so to do; or to allege the defendant's breach of duty arising out of his employment for hire, and the conversion of the goods, money and notes by him, belonging to the plaintiffs, as the gravamen of their complaint. (1 Chit. Pl. 163, ed. before cited.)

The breach of duty and conversion in the latter case would

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be the gist of the action, and the manner the goods, money and notes came into the defendant's hands would be quite immaterial, the same as it formerly was in the old action called *trotter*. (*Gra. Pr. 2d ed.* 206.)

The difficulty in this case arises by the blending, or the connecting together in the complaint, of allegations proper and pertinent to an action solely on the contract, and also to an action for the tort or conversion of the property. This, perhaps, is allowable under the Code, which prescribes that the complaint shall contain "a plain and concise statement of the facts constituting a cause of action, without unnecessary repetition." (§ 142 of the *Code*, sub. 2.)

The allegation in the complaint, that the defendant converted to his own use the goods, notes and money therein mentioned, must be deemed a part of the transaction constituting the real cause of the complaint against the defendant. It is perfectly consistent with the other allegations in the complaint; and there are no perceivable reasons why it should not remain there, if the complaint is tested solely by the Code itself. (§ 167 of the *Code*, sub. 1.)

The charge of a conversion in the complaint is not only proper, but absolutely necessary to make the action *ex delicto*, instead of *ex contractu*. It has made the defendant's counsel believe the complaint charged a tort upon the defendant, and not a simple breach of the contract. The allegation was wholly unnecessary, if a breach of the contract only was charged.

For what purpose, then, was the charge of converting the goods, notes and money, inserted in the complaint?

It is fair to presume and hold, it was inserted therein to characterize the action as *ex delicto*, and to distinguish it from one arising on contract. The plaintiffs should be held to this construction of their complaint by the old and familiar rule, that a pleading should be construed most strongly against the party whose pleading is brought in question. This construction does no violence to § 140 or § 159 of the Code; for, by it the ordinary and popular sense of the language used in the complaint is adopted; and it is presumed men of ordinary understandings,

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who are not lawyers, would put a similar construction upon the language of this complaint.

Whether the action is founded solely on the contract, or the gist of it is for the conversion; or whether the allegation of a conversion is in the complaint or not, is wholly immaterial in determining the question, whether the defendant can be arrested before judgment is rendered in the action, or afterwards on an execution against his person. An order of arrest may be granted in an action for money received, or property embezzled, or fraudulently misappropriated by any agent or other person in a fiduciary capacity. (*Sub. 2, § 179 of the Code.*) An agent employed to collect moneys for his principal is liable to arrest where he appropriates such moneys to his own use. (*Stoll agt. King, 8 How. Pr. R. 298; Burhans agt. Casey, 4 Sand. 707.*)

It is pretty well settled, that it is not necessary the facts which render a defendant liable to arrest should be stated in the complaint. (*Cheney agt. Garbutt, 5 How. Pr. R. 467; Masten agt. Scovill, 6 id. 515; Corwin agt. Freeland, 2 Selden, 560.*) The principle involved in this point was determined the same way prior to the Code. (*Stage agt. Stevens, 1 Denio, 267.*)

The motion to dismiss the proceedings in the cause cannot be granted, because it is too broad and comprehensive. The summons cannot be set aside. It is in proper form, and it clearly shows the action is one arising on contract, which fact was not only properly but necessarily stated in the summons. (*§ 129 of the Code.*) The motion should have been to set aside the complaint, on the ground that the complaint varies from the cause of action indicated by the summons.

Prior to the Code, the true cause of action had to be stated in the *ac-etiam* part of the *capias* by which the action was commenced. And in declaring, if the plaintiff did not pursue the cause of action as set forth in the *ac-etiam*, his declaration and subsequent proceedings only, and not the *capias*, were set aside for irregularity. (*Gra. Pr. 2d ed. 119; Rogers agt. Rogers, 4 J. R. 485; Roosevelt agt. Smith and Vansantvoord, 16 J. R. 44; Durfee agt. Heimstreet, 1 Wend. 305.*)

In analogy to the practice prior to the Code, and by the Code

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itself, the summons must show whether or not the action arises on contract. The complaint, whether served with the summons or subsequently, must conform to the nature of the action appearing in the summons. It will be presumed, in all cases, that the complaint is drawn subsequent to the making or issuing of the summons. The plaintiff should know, before his summons is made out, whether his action arises on contract for the recovery of money only. If he mistakes the nature of his action, he can ask the court for leave to amend his summons. He should not be allowed to make his complaint for a cause of action not indicated by his summons, and then be permitted to say to the defendant, when brought up by a motion for the irregularity, "my complaint is right and my summons is wrong." To hold that the complaint should control the summons, instead of the latter controlling the former, as to the nature of the action brought, would be somewhat like making a judgment conform to the execution issued on it. It would be *currrus bovem trahit*.

As the irregularity complained of is pointed out in the defendant's notice of the motion, relief may be granted under that part of the notice which states the defendant will ask the court for such other or further order as to the court shall seem proper; and the complaint is set aside, unless the plaintiffs shall, within twenty days, amend the summons so it will conform to the complaint, or amend the complaint so it will agree with the cause of action indicated by the summons.

Both parties having erred in their proceedings, no costs of motion are given to either party.

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SUPERIOR COURT.

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The court has no power to order a *lis pendens* to be taken from the files of the court, which is in proper form, and has been filed in an action in conformity with the provisions of the statute.

Although an injunction, which had been granted, and which restrained the defendant from disposing of the real estate sought to be charged by the action, has been dissolved, on the defendant's depositing in court a specific sum of money, as security for the payment of any judgment the plaintiff might recover; the *lis pendens* will not be ordered to be taken from the files of the court, notwithstanding its continuance may defeat a contract for the sale of the real estate, which the defendant may have made after the injunction was dissolved. A plaintiff may give actual notice of his claim to any person who contemplates purchasing, and he may give such a notice as the statute authorizes.

Special Term, Jan., 1856.

THE complaint makes a case for an accounting between the parties, in respect to the proceeds of the sales of two houses and lots in the city of New-York, in which they were jointly interested—claims a balance due the plaintiff, and prays for an accounting, &c.

It charges that a house and lot, on the Third avenue in New-York city, was bought, and paid for in part, with such proceeds, and conveyed to the defendant, and seeks to have such house and lot disposed of, if necessary, and proceeds applied to pay such balance as may be adjudged to be due to the plaintiff. An injunction was granted, prohibiting the defendant from disposing of this house and lot, until the further order of the court, and a *lis pendens*, in proper form, was filed with the clerk of the county.

The injunction was dissolved on the 13th of December, 1855, by order of the court, on the defendant's giving security approved by the court, in the sum of \$1,600, to account for the proceeds of said Third avenue house and lot.

The defendant contracted to sell and convey the house and

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lot, and the purchaser refused to complete his contract on account of the pendency of this action, and the *lis pendens*. The defendant now moves for an order, that the *lis pendens* be taken from the files of the clerk of the city and county of New-York.

DAVID P. WHEDON, *for defendant,*

Insisted that the giving of the security, on which the injunction was dissolved, conferred the right to sell the property without any embarrassment to giving a good title, to result from this action, and the proceedings therein; and that the defendant acquired thereby an equitable right to have the *lis pendens* taken from the files of the clerk of the county.

ROBERT H. SHANNON, *for plaintiff,*

Contended that the court had no power to grant the motion. That the security was a substitute for the injunction, and that only.

BOSWORTH, Justice. The filing of a *lis pendens* is an ordinary proceeding in an action, in which it is sought to subject specific real estate to the operation of any judgment that may be recovered.

It is indispensable, in order to affect persons who may purchase *pendente lite*, in ignorance of the plaintiff's claim, that it should be filed. All who take the title after a notice, in proper form, has been filed with the proper officer, take it with the same consequences that would have resulted from a purchase with actual notice.

If no injunction had been granted, the filing of a *lis pendens* would have secured the plaintiff such rights to it in the hands of the purchaser, as might have existed against the defendant if he had continued to own it. If the plaintiff succeeds in establishing that he is, in equity, a part owner, and that full relief cannot be secured except by a sale of it, and payment to himself of such part of the proceeds as may be required to

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satisfy his just equitable claim, the filing of the *lis pendens* will enable the plaintiff to obtain the same relief, though the property may have been conveyed *pendente lite*.

Although the *lis pendens* is an ordinary proceeding, yet it is, in this state, the subject of statutory provisions. (2 R. S. 174, § 48; *Code*, § 132.)

The court has certainly no power to prevent the plaintiff from giving actual notice, if he can, to every person who may propose to purchase. I cannot imagine any principle on which it can prevent him from giving notice in the way the statute has provided. It cannot rightfully interfere, to take from the files of the clerk of the county a paper, in proper form, and regularly filed under the authority of a statute, which is a notice, in law, to all who may purchase.

The right also existed to obtain an injunction, on presenting a case which entitled the plaintiff to it. A case was made on which the court deemed it just to grant that relief. The court, subsequently, permitted the defendant to substitute security for the injunction, and, on the security being given, dissolved the injunction. When the court made the order dissolving the injunction, neither the court nor the defendant knew of the *lis pendens*, although it had been filed months previously thereto. That order, therefore, in contemplation of the court, as in contemplation of law, was security substituted for the injunction, and that only.

I think the motion should be denied, on the ground that the court is incompetent to grant the relief sought by it.

The motion is denied, with \$7 costs.

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SUPREME COURT.

EDWIN MARSHALL agt. ISAAC F. PETERS.

Where it appears that a plaintiff's *grievance*, upon which he asks an *injunction*, is such that he may amply and readily be recompensed by damages, to be recovered in an *action at law*, an injunction should not be allowed.

Neither should the extraordinary powers of the court be exercised by injunction to restrain competition in trade to any extent.

The *water* in a running stream can never become the absolute *property* of a riparian proprietor, even if he owns both banks, and the stream passes wholly through his lands. All the property that a man can acquire in flowing water is a right to its *use*. He may have a certain right of property in it, but the water itself is not his property. He must allow the waters to pass out of his lands as they enter them, and his only right is, a right to use them as they flow.

Therefore, the *ice* made from the waters in a mill-pond is not the absolute property of the owner of the mill, so that he could sell or dispose of it, as he could the trees and timber, or the earth and minerals on his farm.

Where the owner of a mill, and the land on one side of the centre of the mill-pond, granted a license to an individual to take ice from that portion of the pond,

Held, that the grantee, on complaint that another person was infringing upon his premises by taking and carrying away ice, although he might maintain an action of *trespass*, was not entitled to an *injunction* to restrain the taking of the ice.

Dutchess Special Term, 1856.

MOTION on the part of the defendant to dissolve an injunction-order. The motion is made upon the complaint, answer and affidavits.

An injunction-order was, on the 27th of February, 1856, granted by the county judge of Dutchess, "commanding and strictly enjoining the defendant and his agents, laborers and servants, and all others acting in aid or assistance of him, and each and every of them, &c., that he and they, and each of them, do absolutely desist and refrain from entering upon, and from cutting, sawing, gathering, or carrying away the ice from the pond known as the Red-Mills Pond, owned by David B.

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Lent, which ice belongs to the plaintiff, until this court shall have made further order thereupon."

Upon the service of this injunction-order, the defendant obtained, from Mr. Justice EMOTT, one of the justices of this court, an order requiring the plaintiff to show cause why the above injunction-order should not be dismissed and vacated.

This Red-Mills pond is created by the erection of a dam across the Fall-Kill creek in the city of Poughkeepsie, owned by David B. Lent, which causes the water to overflow the lands on each side of the creek for about half a mile east of the dam. This Fall-Kill creek runs an easterly and westerly course; the farm and lands of Mr. Lent are situate on the north side of the creek, and the deeds to Mr. Lent gives his south boundary "the centre of the creek, and along down the centre of the creek as it winds and turns," &c. The owners of the lands on the south side of the creek have for their north boundaries "the centre of the said creek."

The other facts in the case are sufficiently stated in the opinion of the court.

Upon showing cause,

JOHN THOMPSON & GILBERT DEAN, *for plaintiff*,

Cited the following cases:—3 *Paige*, 584; 2 *Vern.* 390; *Prec. in Ch.* 530; 4 *Ves.* 428; 4 *Edwards R.* 545; *Angel on Water Courses*, 283; 7 *Bar. S. C. R.* 395; 6 *Cow. R.* 518; 1 *Paige*, 447; 13 *John. R.* 212.

LEONARD MAISON & J. F. BARNARD, *for defendant*,

Cited 19 *Bar. S. C. R.* 371, 378; *Voorhies' 2d ed. of Code of 1852*, pp. 229, 230, 231, 240, §§ 219, 401, 402.

EMOTT, Justice. The plaintiff sets forth in the complaint in this action, that David B. Lent is the owner of the premises known as the Red Mills, in the city of Poughkeepsie, and of the right to maintain the dam upon the Fall-Kill creek at its

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present height, and thereby to flood the lands now covered with the waters of the Red Mills pond. That said Lent is the owner of the lands lying along the north shore of the pond for its whole length, and that his south boundary is the centre of the channel of the creek as it ran before the pond was made. He also alleges, that Mr. Lent "has the exclusive right to the waters, frozen and liquid, on the whole of said pond," and that he has conveyed to John J. Grant all his right to such ice, with the exclusive right of entering on the pond to gather the same for five years, from October, 1853. The interest of Grant has been assigned to the present plaintiff, who is engaged in the business of storing and selling ice, and who claims, by this title, to be the owner of all the ice now on the pond, which, he says in his complaint, is of the value of more than \$100 to him.

The grievance of which he complains is, that the defendant is cutting ice from the pond north of the channel, which he claims to be Lent's line, and quite up to the north shore; and alleges that such cutting and taking of ice will be a great damage to him, and asks for a perpetual injunction. On this complaint was issued an injunction, which I am now asked to dissolve.

It will be observed, that the complaint contains no allegation of any precise, or any peculiar, not to say irreparable, injury to be sustained by the plaintiff for the acts complained of. There is no allegation that the ice said to be wrongfully cut by the defendant, or that all the ice now on the pond is absolutely necessary to the plaintiff to enable him to comply with his sales and engagements, or to carry on his business. Nor is it averred that this is the only body of ice accessible to dealers in that article within the city. The claim which was made upon the argument, that Mr. Lent was the owner of all the land covered by the waters of the pond, was evidently not in the mind of the pleader who drew the complaint, and is not the theory on which it proceeds. The whole case is made to rest, then, upon the damage done, or to be done, by the defendant, by cutting and taking out ice on the north side of the channel.

The damage which the plaintiff can sustain by this—[admit-

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ting him to be the purchaser and absolute owner of the ice, which the defendant is interfering with, or with his right to take it]—can only be increased in one of two ways. It is either the injury which he will sustain in his business by the introduction of a competitor, by means of the ice thus obtained, or it is the injury which is sustained by every person upon whose property and rights a trespass is committed. The latter injury in this case consisted in the cutting of the ice beyond the channel only, according to the complaint, and cannot be very serious in amount, since the whole value of all the ice claimed for the plaintiff is put at only \$100. There is nothing in this aspect of the case to distinguish the alleged wrongful act of the defendant from an ordinary trespass.

No consequences are alleged beyond the abstraction of so much of the plaintiff's property, or a trespass to that extent upon his rights. The injury is not irreparable, for the ice is not absolutely necessary to the plaintiff, and, unlike minerals, or earth, the produce of mines, or the covering of land, the ice is constantly reproduced in its season by the action of the elements, as fast as it is abstracted for the use of man. I can see nothing in this case, in its broadest or most favorable aspect for the plaintiff, to distinguish it from an ordinary action of trespass—no grievance which cannot amply and readily be compensated by damages, to be recovered in an action at law, or which requires the interposition of a court of equity. In the other aspect of the consequences to him of the acts complained of, the possible injury to his business by introducing competition, it is obvious that the plaintiff does not state any principle upon which he can invoke the aid of a court of equity.

The mandate of this court, its extraordinary powers of injunction, should never be exercised to restrain competition in trade to any extent.

But it was said that the plaintiff in this action succeeds to all the rights, and stands in the place of Mr. Lent, for all purposes of any suit respecting this pond or its waters; and that Mr. Lent is the absolute owner of the water in the pond, whether frozen or liquid; that it is his property like anything else be-

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longing to him. I am unable to agree to either of these propositions.

There is nothing in the case, in the allegations of the complaint, or in the provisions of the agreement between Lent and Grant, [which is the source of the plaintiff's rights,] connecting or identifying the plaintiff with, or substituting him for Mr. Lent, or his rights and privileges as mill-owner in or as to the waters of this pond.

The plaintiff is not made the owner, or let into any share of any such rights or easement of Mr. Lent. There are a great many rights and remedies which Mr. Lent may possess as proprietor of the mill and dam, and right to flow back the stream, which cannot accrue to the plaintiff under a sale or conveyance of all Lent's right to take ice from the whole or any portion of the pond, even if that right was as extended in Lent as is claimed.

The instrument produced, I apprehend, is a mere license to the grantee to enter upon the pond—so far as its waters cover land of Lent—and remove the ice, so far as that, or the waters from which it is congealed, belong to Lent. The plaintiff here cannot certainly be regarded as interested in the flow of this water, or in any mill-privilege, to entitle him to bring this action. He is at most, on his own showing, simply the owner of the ice, and the act of the defendant, for that reason, a trespass upon him.

But it is quite as far from being true, that Mr. Lent is the owner of the water in this pond, or that it, or the ice formed from it, is his absolute property. The water in a running stream can never become, in any such sense as was claimed on this argument, the property of a riparian proprietor, even if he owns both banks, and the stream passes wholly through his lands. All the property that a man can acquire in flowing water is a right to its use. He may have a certain right of property in it, but the water itself is not his property. He has a right to its natural flow, and to use it for his cattle or his household, or upon his mill-wheels. But he cannot stop its current

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nor divert its flow, nor increase or diminish it, in any appreciable quantity, nor interfere with its quantity or character.

He must allow the waters to pass out of his lands as they enter them, and his only right is a right to use them as they flow. It was said, upon the argument, that there was no proof before the court that there were any mills or mill-seats upon the Fall-Kill below this pond. That is wholly immaterial. The Fall-Kill is a running stream, and this pond has been made by artificially damming its waters; and whether this court can know that there are mills or mill-seats in any number below, or that it merely irrigates agricultural lands, the court is bound to know, as matter of public law, that the only right of any man through whose lands it passed is a mere right to its use, and its usual and uninterrupted flow. Its water, therefore, or the ice made from it, is not the absolute property of Mr. Lent, so that he could sell or dispose of either of them, as he could the trees and timber, or the earth and minerals upon his farm.

Even if the plaintiff here represented all the rights of Mr. Lent, there is not enough in the complaint to retain this injunction. There is no allegation that the removal of this ice will diminish the waters of the stream in such quantity as to interfere with the mill-privilege, or water-power claimed and enjoyed by Mr. Lent, or that it will have any appreciable effect upon his rights as a mill-owner. *De minimis non curat lex*; and while the defendant may be liable in trespass to some damages for taking ice, or water in the shape of ice, to the extent of twenty or thirty feet square, and from one to two feet in thickness, out of the pond, where it covered lands in which he had no right or license, it is clearly not a case to invoke the aid of a court of equity to restrain such an act by injunction.

In every view which I have been able to take of this case, I am satisfied that this injunction cannot be sustained. I do not consider the question which was prepared and argued with great industry and ability, as to the extent of the title of Mr. Lent, and of the proprietors south of the pond, or the ownership of the bed of the pond, of any consequence to the decision of this motion, or to the plaintiff's right to this injunction, and there-

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fore I express no opinion upon it. If the plaintiff should desire to review my decision, and should be advised that it is material for him to prove the extent and location of the premises conveyed by the deeds introduced from Gilbert Livingston and Petter Tappan to Myndert Van Kleeck in 1789, from M. Van Kleeck to Henry A. Livingston in 1798, from H. A. Livingston to Gerardus Smith in 1799, and from Gerardus Smith to Joseph Harris in 1815, he may file an affidavit of a surveyor as to these points, with the papers used on this motion.

The injunction must be dissolved, with \$10 costs.

SUPREME COURT.**In the matter of ISAAC ADRIANCE agt. THE SUPERVISORS OF
THE CITY AND COUNTY OF NEW-YORK.**

Where a *specific* duty is imposed by statute on *public officers or bodies*, they may be compelled, where it affects a particular party only, to exercise it by *mandamus*, although an *action for damages* may also lie.

The supervisors of a county are not to be controlled as to the amount to be allowed by them for services chargeable on the county, when they are to judge of the value of the services; but if there be a sum chargeable against the county, and they reject it as *illegal*, and it is *legal*, they will be compelled by *mandamus* to admit the claim, and to decide how much is payable under it.

In the city of New-York, the board of supervisors, in some respects, has greater powers than those in the country.

The power of correcting an erroneous assessment, or of remitting or reducing a tax imposed by law; it is well known, is exercised by the *new board*, after the term of the officers composing the board which imposed the tax has expired. This power, too, is given by law to the board of supervisors, as a *quasi corporation*—as a body known to the law as always in existence, however the members of it may change. Although the assessment-rolls may have passed out of the hands of the supervisors of the city and county of New-York, they have the power, on a proper application, to correct them, whether the supervisors in other counties have that power or not.

The *tax-commissioners* of the city and county of New-York have no power to increase the assessors' *valuation* of property; their power, under the act of

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1851, authorizes them to add and assess, according to law, any real or personal estate liable to taxation, which may have been *omitted by the assessors*, or (in the language of the act) "*which may not have been assessed*" by the assessors. It was not intended that this should be an appellate power to *increase* the assessor's valuation; it is limited by its terms to cases in which the estate has not been assessed by the assessors, or in which, by accident or otherwise, they have not exercised their judgment. Therefore *held*, that where the tax-commissioners *increased* the assessed valuation of the estate, as made by the assessors, the board of supervisors could be compelled, by *mandamus*, to correct the assessment by conforming it to the original assessment, as made by the assessors.

The *affidavit* alone of the owner, to reduce the valuation of his property below that imposed by the assessors, without the *examination, or without the examination being reduced to writing*, either before the assessors or before the tax-commissioners, as required by law, is of no avail as evidence, to reduce the tax.

New-York Special Term, Dec., 1854.

MOTION for mandamus.

Isaac Adriance moves for a mandamus against the supervisors of the county of New-York, to require them to remit so much of the taxes on his real estate in John-street, as is levied on the increased valuation of said property by the tax-commissioners, beyond the valuation by the assessors; and also to remit the tax on any valuation of his property on the Third and Fourth avenues, and between 58th and 59th streets, beyond the value sworn to by him.

The John-street property belonged to Mrs. Adriance, and was valued by the assessors for 1853 at \$22,000: the tax-commissioners raised the valuation to \$28,000, and when applied to to restore it to the former valuation, refused to do so. Mr. Adriance applied to this court to compel the tax-commissioners to restore the valuation, and it was refused on the ground that the control of the books had passed from the commissioners. He then applied to the supervisors to correct the valuation, and they refused.

The block on the avenues was valued by the assessors at \$31,000; Adriance appeared before the commissioners, and made affidavit that it was, in fact, worth no more than \$20,000. That affidavit was retained by the commissioners, but they re-

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fused to adopt it as a correct valuation. Other lands belonging to him were valued by the assessors at certain sums, and the valuation increased by the tax-commissioners. Mr. Adriance applied to the supervisors to correct all these alleged errors, or irregularities, and they refused.

JEREMIAH E. CARY, *for plaintiff.*

ROBERT J. DILLON, *for defendants.*

MITCHELL, Justice. The first question in these cases is, whether a mandamus is the proper remedy?

In *The People ex rel. Philip Church agt. The Supervisors of Allegany*, (15 Wend. 198.) a *certiorari* was refused, because the writ was in the discretion of the court, and the objections made to the assessments, if valid, "were not such as affected the relator's interest alone, but were, in principle, applicable alike to every person who was named in the tax list;" that the complaint was not that "the relator had been required to pay more than his just proportion of the county burdens; but that in consequence of the allowance of illegal charges, his tax, *in common with that of every other person* named in the assessment-rolls, had been improperly increased." (15 Wend. 204.)

Here the relator applies on grounds peculiar to himself; and his application is not for a *certiorari*, which, by bringing up all the proceedings, might stay the collection of all taxes, but for a *mandamus*, which would, if he is correct, make an assessment legal in amount and form, which is now illegal in both respects.

In *Hull agt. Supervisors of Oneida County*, (19 J. R. 259,) a surgeon, who had rendered services to a pauper, applied for a mandamus to the supervisors to compel them to audit and allow his account. The mandamus was refused on the merits, on the ground that the services were gratuitous; but the court held that it was the proper remedy, but for that objection; and that "when the inferior tribunal has a *discretion*, and proceeds to exercise it, this court has no jurisdiction to control that *discretion* by mandamus;" but if the subordinate public agents refuse to act, or to entertain the question for their discretion in

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cases where the law enjoins on them to do the act required, it is the office of the court to enforce obedience to the law by mandamus, in cases where no other legal remedy exists. (p. 262.) And they held that "if the *claim was legal*, there was no doubt of their jurisdiction to instruct and guide the supervisors in the execution of their duty by *mandamus*—not to control their discretion in judging what is a reasonable compensation for such services, *but to compel them to admit the claim as a county charge, and to exercise their discretion as to the amount.*" (p. 263. See, also, *the same distinction in The People ex rel. Phanix agt. Supervisors of New-York*, 1 Hill, 362-7.)

Chief Justice SPENCER had said before, in *The People ex rel. Wilson agt. Supervisors of Albany*, (12 J. R. 415,) that "the office of a writ of mandamus is to require the persons to whom it is directed to do some particular thing, *which appertains to their office and duty*, and which the court issuing it supposes to be consonant to right and justice; and that if the party making the application has a legal right, and no other specific legal remedy, the writ generally goes." The latter part of this opinion is to be understood in connection with the power, as applying only to matters appertaining to a public office or duty.

In *Bright agt. The Supervisors of Chenango County*, (18 J. R. 242,) the court granted the writ to compel the supervisors to audit and allow the account of the clerk of the county, for books purchased by him for recording deeds, mortgages, &c., in his office—the court holding that they were proper county charges, but not passing on the value of the books.

The Bank of Utica agt. The City of Utica, (4 Paige, 399,) was a bill to compel the city to remit a tax laid on the surplus funds of the bank, beyond its fixed capital. The relief was granted, as the objection that the remedy was at law, was waived; and the Chancellor said, that "as the charter of the city of Utica gives to the common council of that city the exclusive control and direction as to the assessment and collection of the city taxes, he thought the complainant had a perfect remedy at law, by an application to the supreme court for a mandamus, to *compel the common council to correct their assessment and taxa-*

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tion of the property of the bank, if it was illegal; but that the remedy would be much more imperfect and doubtful in the case of an ordinary town and county tax, where the assessment is made by one body and the tax imposed by another, especially if the error, or illegality, did not appear upon the face of the assessment-roll.

In *The People* agt. *The Mayor of New-York*, (10 Wend. 893-897,) the court, on the merits, refused the relief, but held that *mandamus* was the proper remedy to compel the corporation to execute a lease on a sale for taxes; and that it was no objection that relief might be had in equity or by indictment. In that case an action for damages would equally have lain.

NELSON, Chief Justice, says, that whenever a *legal* right exists the party is entitled to a *legal* remedy, and, when all others fail, the aid of this may be invoked. But that case, and the others before referred to, show, although they do not so declare, that where a *specific* duty is imposed by statute on *public officers or bodies*, they may be compelled to execute it by *mandamus*, although an action for damages might also lie.

In *Smith, &c., pier-proprietors in the city of Albany*, agt. *The Comptroller of the State*, (18 Wend. 659,) a *mandamus* was granted to compel the comptroller to pay certain tolls collected by him for the state, and which the pier-proprietors were entitled to receive from him, unless the state could hold them as a set-off to another claim; the court holding the claim of the state to a set-off was bad.

In *Onderdonk* agt. *The Supervisors of Queens County*, (1 Hill, 195,) the allegation of the relator was, that the *town* auditors had improperly allowed a certain sum as a charge against the *town* of North-Hempstead; and the board of supervisors of the county then directed that sum to be levied upon the *town*, and the warrant for that purpose was issued to the collector.

The court held that no *certiorari*, *mandamus*, or *prohibition* could issue to the collector, as he was a mere ministerial officer: that the *certiorari* to the *town* auditors, or to the *supervisors*, would bring up only such proceedings as still remained before them, and could not remove the warrant in the hands of the

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collector; and that if the supervisors had before them the certificate in due form of the auditing of the town accounts, that was a sufficient authority for the supervisors, whether the accounts had been, in fact, properly audited or not; and the court compared this to the case of *The People ex rel. Church agt. The Supervisors of Allegany*.

In *The People ex rel. The Bank of Watertown agt. The Assessors of the Village of Watertown*, (1 Hill, 616,) the court held that banking associations were taxable as incorporated banks on their capital. The question was raised on *mandamus*, but no point was made whether that was the proper remedy or not.

In *The People ex rel. M'Master and Harvey agt. Supervisors of Niagara*, (4 Hill, 20,) the assessors had assessed two banking associations and a railroad company, and the supervisors of the county struck out the names of all three of the companies from the assessment-roll. The court granted a peremptory mandamus to compel the supervisors to restore their names.

In *The Ontario Bank agt. Bunnell*, the court held that if certain capital of a bank was not taxable, the bank should have applied to the proper officers to reduce the amount, and the court said that if the relief was improperly refused, "there was an *appropriate remedy*." (10 Wend. 195.) This seems to imply a peculiar remedy—not the common remedy by action of trespass.

These cases decide that the supervisors of a county are not to be controlled as to the amount to be allowed by them for services chargeable on the county, when they are to judge of the value of the services; but if there be a sum chargeable against the county, and they reject it as illegal, and it is legal, they will be compelled by *mandamus* to admit the claim, and to decide how much is payable under it. And the general principle may be stated, that where a *specific duty* is imposed on them, or other public officers, by statute, and they do not conform to the statute, and the omission to conform affects a particular party only, and not the whole assessment-list, a *mandamus* will issue to compel them. If, in the cases now before the court, the supervisors had no right by statute to order the

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collection of taxes according to a valuation imposed by the tax-commissioners, when the assessors had imposed a smaller valuation, or to impose the collection on the valuation of the assessors, where the party made such affidavit as was made here, then they have violated the statute, and should be made to conform to it, unless the application is too late.

When a specific duty is enjoined by statute, it is made specific because the public interest requires that it should be executed in that way. It is better for the public that the specific remedy be applied to removing the wrong directly, than to have actions for damages, in which a supervisor may be punished in heavy damages for an irregularity, although he erred only in judgment; or in which the complainant may find a judgment in his favor fruitless of any practical results, except the payment of the costs of his own counsel. The citizen who is unlawfully taxed ought not to be baffled by sending him from court to court, to seek some untried remedy, unless that remedy is clear, if that which he seek may lawfully be granted.

Is the application too late, because the supervisors have passed the books out of their hands into the hands of the collector? It was so intimated in *Onderdonk agt. The Supervisors of Queens.* (1 Hill.) But the supervisors in this city have greater powers than in the country.

In this city, the assessment-books or rolls are delivered to the receiver about the 1st of September in each year. (*Laws* 1850, ch. 121, § 27.) Mr. Adriance presented his petition to the supervisors about the 7th of January, 1854—about four months after the books were delivered to the receiver, and it was rejected in April following.

By the laws of 1844, (ch. 250, § 2,) the supervisors in this city may (at any meeting at which the mayor or recorder shall be present) correct any *erroneous* assessment which might thereafter be made by the assessors, provided *application* for the relief should be made within six months after the assessment-rolls should be returned as required by law; and provided proof were made to the satisfaction of the supervisors, by affidavit of the applicant or other legal evidence, that the *erroneous* assess-

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ment did not result from any neglect on the part of the person applying for relief.

By § 28 of the law of 1850, the same board may remit or reduce a tax, as imposed by law, for good cause shown by affidavit and filed with the tax-commissioners; and such reduction or remission must be made before the collection of the tax; and the application therefor must be made within six months from the delivery of the books to the receiver for collection.

This power of correcting an erroneous assessment, or of remitting or reducing a tax imposed by law, it is well known is exercised by the new board after the term of the officers composing the board which imposed the tax has expired. This must be the intention of the law which gives six months to the citizen, after the books are delivered to the receiver, to apply for the relief; and those books are by law to be delivered on or before the 1st of September; so that, ordinarily, the six months would not expire before the 1st of March—and the terms of office of one-half of the aldermen expire at the end of each year. The power, too, is given to the board of supervisors as a quasi-corporation—as a body known to the law as always in existence, however the members of it may change; and the power is given to that legal entity, thus always existing, that it may alter and correct the assessments. Although, therefore, the books may have passed out of the hands of the supervisors, they still have the power to correct them, whether the supervisors of other counties have that power then or not.

The statute is, that the supervisors *may* correct the erroneous assessment, or remit or reduce the tax. This is not merely permissive to them, at least where the application is on the ground of an *erroneous* assessment: however it may, when the tax is sought to be reduced as a charity or favor. The term "may" means "must" in a statute, when a right is given or duty imposed. It is a strict right of an aggrieved party to have an erroneous assessment corrected, and it is the duty of one who has power to correct it, to do so.

The objection of the supervisors was not put on the ground that Mr. Adriance was too late, or had not shown that the error

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in the assessment had not proceeded from any neglect on his part. No objection has been made to the right of Mr. Adriance to appear as relator on account of the property on John-street belonging to his wife. If it were raised, the writ might be allowed, as to that property, to issue in the name of both; or it might be that he, as liable for the taxes imposed on his wife's real estate, would be entitled to proceed alone.

This brings us to the questions raised by the relator. The distinctive powers of assessors, and of tax-commissioners or supervisors, may be judged from the duties imposed on each. The assessors are appointed for towns or wards only; they are to value each parcel of the real estate within their town or ward, and the personal estate of each of the inhabitants of the same place. This they can do by viewing each parcel of land of each owner within their limits, and by inquiries and other means. Their information may thus reach to each individual and to his property, and is intended to, and may easily have, this effect. From the narrow limits within which they are to act, they are presumed to be able to acquaint themselves with the value of each piece of property within their cognizance, and the fortune of each individual.

Under the Revised Statutes, they were bound, after making their assessment, to give twenty days' notice that they would meet to review their assessments, and on application of any one conceiving himself aggrieved, to review their assessment; and if such person had not previously made an affidavit of the value of his property, they were bound, on receiving such affidavit, to reduce the assessment to the sum specified in the affidavit. (1 R. S. 393, § 22.) This was conclusive on them, and on all others, and accordingly in their return they stated, that they had valued the property in the return at its true value, *except when the value had been sworn to by the owner.* (Id. 394, § 26.) If the owner had made the like affidavit before the publication, this was equally conclusive, (p. 393, § 17.)

Here their duties ended. The board of supervisors of the county then having received the rolls from the assessors of their several towns or wards, were to examine the rolls—for certain

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purposes prescribed—so as plainly to exclude any interference with the valuation made by the assessors of the property of any particular individual, at least so as to increase it. The supervisors being county officers, could not be supposed to have the accurate knowledge of the separate properties, in any town or ward, that the assessors of such town or ward would have; but they would have a better means of judging whether the whole or aggregate valuation of any one town or ward in the county was more or less than it should be, in comparison with other towns or wards. Accordingly, the supervisors, under the Revised Statutes, were to examine the rolls of the several towns, for the specific “purpose of ascertaining whether the valuations in one town or ward bore a just relation to the valuations of all the towns and wards in the county,” and to accomplish this purpose, and this only, “they might increase or diminish the *aggregate* valuations of real estate in any town or ward, by adding or deducting such sum upon the hundred as might, in their opinion, be necessary to produce a just relation between all the valuations of real estates in the county;” (*id.* 395, § 31;) but they could in no case reduce the *aggregate* valuation of *all* the towns and wards below the aggregate valuation thereof as made by the assessors.

By a law passed for this city in the same year that the Revised Statutes took effect, (1830, ch. 365,) all the assessors of the city were to form a board of assessors, but without power to increase any individual assessment. They were to adopt such rules as would be best calculated to produce equality and uniformity in the different valuations of property and assessments in the several wards; and after the assessment-rolls should be completed, and *before* the fair copies should be made for the inspection of the inhabitants, they were to compare the several rolls “for the purpose of ascertaining whether the valuations in one ward bore a just relation to all the wards in the city.” (§ 4.) In other words, to judge between ward and ward, not between an individual and the state. They had also the same power as the Revised Statutes gave to supervisors to increase or diminish the *aggregate* valuation of real estate in any

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ward, by adding or deducting such sum upon the hundred as might, in their opinion, be necessary to produce a just relation between all the valuations of real estate in the city; and the same power, with the same limitations, was also given to the supervisors. (*Id.* §§ 4 & 8.) So the law continued until 1850 or 1851, when, the defendants contend, the law was altered.

The act of 1850 (*ch.* 121) did not alter the duties of the assessors, severally nor as a county board, from what they were before. (§§ 10, 11.) It appointed tax-commissioners, and required them to keep a record of all taxable property, and of persons subject to taxation, and of all maps, and to preserve the assessment-rolls; also to prepare books with proper blanks for the assessors, and to examine and compare the assessment-rolls for the several wards, for the same purposes, and with the same powers, before stated as to supervisors. (§§ 15, 16, 17.) They then were to give three weeks' notice, that the "assessors have completed their assessment-rolls," and that the tax-commissioners will meet to *review the assessments on the application of any person conceiving himself aggrieved.* (§ 18.)

Thus their power to review is limited to the case when the application is made by a person conceiving himself aggrieved. Who that person is, is shown by the next section. They are required, (§ 19,) on the application of any person conceiving himself aggrieved, to review the assessment; and when the person objecting—(evidently meaning the same person before spoken of)—has not been previously examined, under oath, by any assessor concerning his property, and made affidavit according to law, they must, after such examination shall have been had, and affidavit been made, reduce the assessment to the sum specified in the affidavit.

The commissioners could review only on the application of a person conceiving himself aggrieved, and such applicant or objector was one who might have filed his own affidavit to reduce the amount of the assessment. The person referred to could, therefore, only be the one who might apply to reduce the valuation of his own estate, on affidavit or other proof, that

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the valuation was too high—not on an affidavit that another's property was valued too low. Although an undervaluation of one might affect the total amount to be collected from others, it could not affect the only question then before the assessors—what was the true value of the property of the one or the other? As the remedy for the aggrieved party was to be a reduction, not an increase, of valuation, the aggrieved party could only be the one whose property was too highly valued.

Section 21 shows that this affidavit was to be conclusive on the commissioners as before it was on the assessors, for it says that the commissioners must, *thereupon*, correct the assessment-roll for each ward. It however adds, that they must add and assess, according to law, any real or personal estate liable to taxation, which may have been *omitted by the assessors*; or, (as the act of 1851 substitutes,) which *may not have been assessed* by the assessors.

This is an additional power not possessed before; but it is not an appellate power to increase the assessors' valuation; it is limited by its terms to cases in which the estate has not been assessed by the assessors; to cases in which, by accident or otherwise, they have not exercised their judgment. New powers granted to inferior jurisdictions are to be construed strictly. It would be in direct opposition to this rule, and to the plain meaning of the words, to hold a power to add to an assessment-list any real or personal estate not assessed by the assessors, to include a power to add to it such estate which *had* been assessed by them—thus making negative and affirmative language the same. The language used in 1850—"estate omitted by the assessors"—only included the case where the description of the estate was omitted. The amendment of 1851 gave the power, not only in that case, but also where the estate was described, but the valuation was omitted by the assessors. In either case it was not assessed by the assessors, and thus those words have full effect given to them, without giving the commissioners power to increase a valuation.

As this construction also conforms to what has been hitherto the policy of the law in assessments, it is to be assumed to con-

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form best with the intention of the legislature, when there is not a clear intention to the contrary. There is also strong reason for retaining the law as it is, unless the law should be amended in other respects.

While the books are in the hands of the assessors the property-owner may see them, and be content with their judgment, or he may see them in the hands of the tax-commissioners on the first day that they are exhibited by the commissioners, and then be willing to submit to the decision made by the assessors. He would then be led to believe that he had no more to do with the assessment. But if the commissioners have the power which they assumed in this case, they might, after he had left, and without any notice to him—without any proofs, except their own opinion—reverse the judgment of the assessors: this, too, they could do in this summary way even where the owner had sworn to the value of his property—and as to personal estate, as well as to real estate. In the case of personal estate the evil would be glaring; for there it might be that the owner, from the nature of the property held by him, (as taxable stocks,) or the extent of his indebtedness, would be able to convince the commissioners that the original valuation was correct. It is true that the commissioners, from a sense of justice, endeavor to give notice to owners before they *definitely* increase their assessment. But there is no provision in the law to compel them to do so; and, until there is some such provision, it would be extremely unjust so to construe a law, by a bold interpretation, as to give the commissioners power, not merely to judge one without his being heard, but to reverse, without his knowledge, a judgment lawfully made where he was heard.

As the commissioners have no right to increase the valuation made by the assessors, and by the increase make illegal the assessment which they impose; they violate their duty as prescribed by the statute, and should be compelled by mandamus, when the application is made in due time, to restore the rolls, so that they shall conform to the statute. And as the supervisors of this county are to correct any erroneous assessment, they were bound to correct this; and should be required to do

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so by *mandamus*. This has the advantage of being a specific remedy, directly meeting the evil that exists—making valid the assessment which would otherwise be illegal, and saving the supervisors personally, and probably the city, from heavy losses, if the party aggrieved were left to an action for damages.

This applies to the property on John-street. The next question relates to the property on Third and Fourth avenues, and other property out of town. The right to a reduction there depends on the question, whether Mr. Adriance has fully complied with the law so as to make his interested and biased opinion countervail that of the assessors: to do this he must strictly comply with the law. The act of 1850 gave the right to the owner to reduce the valuation of his own property below that imposed by the assessors, when he relied on his own evidence alone, only after “an examination had been had,” “under oath, concerning his property,” and an “affidavit been made,” by him, “of the value thereof, according to law.”

This examination, if it had not been made by the assessors, was to “be had before the tax-commissioners,” and the oath to be taken before them. And to show conclusively that the affidavit alone was not sufficient, and that it was not sufficient to reduce that alone to writing, the act requires that “the tax-commissioners shall *reduce such examination to writing*, and the *same* must thereon, *together with the affidavit*, be filed in their office.” The affidavit, without the examination, or without the examination being reduced to writing, is of no avail against the sworn valuation of disinterested assessors. (*§§ 19, 20, of the act of 1850, ch. 121.*)

This construction is also reasonable. If the owner is sworn to answer such questions as should be put to him, and should be obliged to say, on oath, that he had been offered two or three times as much for his property as he proposed to value it; that he would not sell it for two or three times as much; that his neighbors’ lands on each side of him were no better than his; and that he would give more for their lands than his valuation of his own; and that they had been recently bought

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and sold for much more: or if he answered thus to any part of his examination, he probably would refrain from sustaining his first valuation of his own property by a positive affidavit. The legislature meant thus to shield the public from the thoughtless and inconsiderate estimate of an owner.

Whether the act of 1851, (*ch. 176*), being in *pari materia*, and of a general nature, does not by implication now prevent the affidavit and examination from being conclusive on the commissioners, where they sustain the valuation of the assessors, it is not necessary to inquire. If it is desirable that the commissioners should have the power given by that act to the assessors, it would be most expedient to seek the power from the legislature.

The mandamus is denied as to all the property, except that in John-street; and is granted as to that.

COURT OF APPEALS.

THE PEOPLE OF THE STATE OF NEW-YORK upon the complaint of JOHN MATTHEWS, appellants, agt. THOMAS TOYNBEE respondent.

THE PEOPLE OF THE STATE OF NEW-YORK, defendants in error, agt. JAMES G. WYNHAMER, plaintiff in error.

[*Note to opinion of Comstock, J.*]

The *constitution* of this state vests the “legislative power” in the Senate and Assembly, subject, however, to some important special *limitations*. And, 1st. “No member of this state shall be disfranchised or deprived of any of the rights or privileges secured to any citizen thereof, unless by the law of the land or the judgment of his peers.” (*Art. 1, § 1.*)

2d. “No person shall be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.” (*Art. 1, § 8.*)

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The “*Act to prevent Intemperance, Pauperism and Crime,*” passed April 9, 1855, in its constitutional construction, falls within, and must be judged by, these *limitations* of the constitution.

When this act was passed, intoxicating liquors, to be used as a beverage, were *property*, in the most absolute and unqualified sense of the term; and, as such, entitled to constitutional protection, the same as other property.

If the legislature has no power to confiscate and destroy property in general, it has no such power over any particular species.

If intoxicating liquors are property, the constitution does not permit a legislative estimate to be made of its usefulness, with a view to its destruction. That which belongs to the citizen in the sense of property, and as such has to him a commercial value, cannot be pronounced worthless or pernicious, and so destroyed or deprived of its essential attributes.

The prohibitions and penalties of the “*Act to prevent Intemperance, Pauperism and Crime,*”—(see 11 *Hon. Prac. Rep.* 289, for the whole act,)—pass the utmost boundaries of mere *regulation* and *police*; and by their own force, assuming them to be valid, and faithfully obeyed and executed, would work the essential loss or destruction of the property at which they are aimed. The act, therefore, is in conflict with the provisions of the fundamental law of the state, and is *unconstitutional* and *void*.

The *spirit* and *intent* of the act is to *extinguish* and *annihilate* intoxicating liquors as a beverage,—which, in all ages, has constituted their primary and principal use,—and, with few exceptions, so minute and trivial as scarcely to disturb the general scheme, one of fierce and intolerant proscription.

When a law annihilates the value of property, and strips it of its attributes, by which alone it is distinguished as property, the owner is deprived of it according to the plainest interpretation, and certainly within the spirit, of a constitutional provision intended expressly to shield private rights from the *excise* of arbitrary power.

Legislative discretion, in *regulating* and *controlling* the traffic in intoxicating liquors, must preserve the *right* of the citizen to his property—a right which includes the power of disposition and sale, to be exercised under such restraints as a just regard, both to the public good and private rights, may suggest.

In reference to the analogy between this act and the license and excise laws of this and other states, which are admitted to be constitutional, the answer is, the analogy does not exist, because, however difficult it may be to define, with accuracy and precision, the line of separation, there is a broad and perfectly intelligible distinction between what is *plainly regulation* on the one side, and what is *prohibition* on the other.

It is certain, that the legislature cannot totally annihilate commerce in any species of property, and so condemn the property itself to extinction. It is equally certain that the legislature can regulate trade in property of all kinds. Between *regulation* and *destruction*, there is somewhere, however difficult to define with precision, a line of separation. All reasoning from analogy,

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therefore, between the two cases, must be fallacious, because it is, simply, reasoning against admitted conclusions.

So there is no reasoning by analogy between this law and other acts, producing great injury to private property, which have been declared constitutional,—such as the embargo act of congress in 1807,—statutes conferring upon municipal corporations powers which, in their execution and ultimate result, inflict incidental or consequential injury,—the authorized destruction of buildings in the city of New-York, in cases of fire—laws of quarantine—laws against smuggling,—laws against gambling, &c., where property is specifically forfeited, and so the owner deprived of it.

Because such laws were enacted either for the *protection* and *conservation* of property; or injuring it, in their effects only, in a remote and incidental result; or were founded upon, and were mere regulations of the common-law right of any person to destroy property in a case of immediate and overwhelming necessity. And others, that they only resemble the present law in the *character of the punishments*,—the *prohibitions* themselves being totally unlike, and relating mostly to different subjects,—the question being, whether the *prohibitions*, or any one of them, being constitutional and valid.

And besides, it is an entire misconception of this law to say, that the species of property to which it relates is *forfeited for a violation* of its provisions. It is simply *extinguished* by the force of the prohibitions themselves.

A *forfeiture* of goods implies a *title* to them, good against all the world, but if this law is valid, then the owner has no title to lose.

[*Note to opinion of SELDEN, J.*]

The question in this case is not one of expediency, but of power. Every sovereign state possesses within itself absolute and unlimited legislative power. There is no arbiter, beyond the state itself, to determine what legislation is just. While, therefore, the *right* of a sovereign state (where all its powers are concentrated in the hands of the people) to pass arbitrary and tyrannical laws may, its legal *power* cannot be denied.

In a perfectly *natural and simple* distribution of the governmental powers,—(executive, legislative and judicial,)—it is not within the province of the judiciary to pronounce *any* act of the legislature void. It may, however, acquire this right through an artificial distribution of those powers by means of the *organic* law.

Under our state constitution, (*Art. 1, § 3.*) “The legislative power of this state shall be vested in a Senate and Assembly.” This means, of course, *the whole* legislative power. But this legislative power is not equally absolute as it was with the people; because, by other clauses in the constitution portion of it has been transferred to the judiciary. The *constitution* being the result of legislation by the people themselves, before parting with their power, is the paramount law. When, therefore, any law passed by the legislature conflicts with this, (the constitution,) the judiciary pronounces between them, as it does between the acts of two successive legislatures, and the paramount law prevails.

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To determine the extent of the law-making power, it is necessary only to look to the provisions of the constitution. It has, and can have no other limit than such as is there prescribed; and the doctrine that there exists in the judiciary some vague, loose, and undefined power to annul a law, because in its judgment it is "contrary to natural equity and justice," is in conflict with the first principles of government, and can never be maintained.

The remedy for unjust legislation, provided it does not conflict with the organic law, is at the ballot-box; and there is no provision of the constitution, nor fundamental principle of government, which authorizes the minority, when defeated at the polls upon an issue involving the propriety of a law, to appeal to the judiciary, and invoke its aid to reverse the decision of the majority, and nullify the legislative power.

The clauses in our state constitution—that "no member of this state shall be disfranchised or deprived of any of the rights or privileges secured to any citizen thereof, unless by the law of the land, or the judgment of his peers," and that no person shall "be deprived of life, liberty, or property, without due process of law," must be understood as intending to secure to every citizen a *judicial trial*, before he can be deprived of life, liberty, or property; that no person shall be deprived, by any form of legislation or governmental action, of either life, liberty, or property, *except as the consequence* of some judicial proceedings, appropriately and legally conducted.

A law, therefore, which, by its own inherent force, extinguishes rights of property, or compels their extinction, without any legal process whatever, comes directly in conflict with the constitution.

The first four sections, which embrace the prohibitory features of the act under consideration, with the specific penalties annexed to its violation, must be considered as to some of their provisions, as *virtually depriving* the owners of spirituous liquors of their property, without legal process, thereby rendering the whole act *unconstitutional* and *void*.

Although the constitutionality of the general objects of the prohibitory law may not be questioned, but the power of the legislature to prohibit the sale of intoxicating liquors, for all except mechanical, chemical and medicinal purposes, fully conceded, it cannot be admitted that the legislature has the right to compel their *immediate and unconditional destruction*, which this act substantially does.

As to the argument, that the legislature has the conceded power to authorize the destruction of property in certain cases, for the protection of great public interests—such as the blowing up of buildings during fires, destroying infected articles in times of pestilence, the enactment of quarantine laws, &c.,—the answer is, that the legislature does not, in these cases, *authorize* the destruction of property; it simply *regulates* that inherent and inalienable right, which exists in every individual, to protect his life and his property from *immediate* destruction. His justification rests upon the *immediate* and *imminent* danger to life and health, which such laws are enacted to avert.

The reasoning which would apply the provisions of this law to such cases, would enable an individual to successfully argue, that because he has a right to pro-

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tect his life or property from immediate destruction, he has, therefore, a right to resort to any measures he may deem necessary to guard against remote and contingent dangers.

[*This decision affirms that of the supreme court, in the second district, in the first above-entitled cause,—(11 How. Pr. R. 289,)—and reverses that of the eighth district in the second above-entitled cause—(id. 530)—thus settling the UNCONSTITUTIONALITY of the prohibitory liquor law of April 9, 1855.]*

March Term, 1856.

JOHN M. VAN COTT, and
ALBERT SAWIN, *for sustaining the constitutionality of
the law.*

JOHN A. LOTT, and
AMASA J. PARKER, *contra.*

COMSTOCK, J. The defendant (Wynhamer) was indicted and convicted by a common-law jury, in the court of sessions of Erie county, for selling liquors in small quantities contrary to the "Act to prevent Intemperance, Pauperism and Crime," passed April 9, 1855. The indictment contains no allegations to bring the law within any of the excise laws of the state, even if those can be regarded as unrepealed, and the conviction therefore must stand, if it can stand at all, upon the statute referred to.

It was admitted on the trial that the defendant was the owner of the liquors in question before and at the time the law took effect; and his counsel insisted that he was entitled to an acquittal on the ground, among others, that the statute was unconstitutional and void. The proposition was overruled. The supreme court in the eighth district affirmed the conviction,—thus determining that the act, in its prohibitory clauses, was constitutional and valid; and this is the only question I shall consider.

The constitution of this state has vested "the legislative power" in the senate and assembly, subject, however, to some special limitations, which are of very great interest and importance. It is declared, (*Art. 1, § 1,*) that "no member of this

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state shall be disfranchised, or deprived of any of the rights or privileges secured to any citizen thereof, unless by the law of the land or the judgment of his peers."

It is further declared, (*Art. 1, § 6.*) "that no person shall be deprived of life, liberty, or property, without due process of law. Nor shall private property be taken for public use without just compensation." Without inquiring into the extent of legislative power in the absence of special restraints, I think the case before us can be, and should be determined under these limitations, the construction, force and application of which will be hereafter considered.

And in determining the question, whether the "Act to prevent Intemperance, Pauperism and Crime," was an exercise of power prohibited to the legislature, an accurate perception of the subject to which it relates is the first requisite. It is, then, I believe, universally admitted that when this law was passed, intoxicating liquors, to be used as a beverage, were *property* in the most absolute and unqualified sense of the term ; and as such, as much entitled to the protection of the constitution as lands, houses, or chattels of any description. From the earliest ages they have been produced and consumed as a beverage, and have constituted an article of great importance in the commerce of the world. In this country, the right of property in them was never, so far as I know, for an instant questioned. In this state, they were bought and sold like other property ; they were seized and sold upon legal process for the payment of debts ; they were, like other goods, the subject of actions at law, and, when the owner died, their value constituted a fund for the benefit of his creditors, or went to his children and kindred, according to law or the will of the deceased. They entered largely into the foreign and internal commerce of the state, and when subjected to the operation of this statute many millions in value were invested in them. In short, I do not understand it to be denied that they were property in just as high a sense as any other possession which a citizen can acquire. Judicial authority might be cited, but this does not seem necessary, where there is scarcely a controversy.

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It may be said, it is true, that intoxicating drinks are a species of property which performs no beneficent part in the political, moral, or social economy of the world. It may even be urged, and I will admit, demonstrated with reasonable certainty, that the abuses to which it is liable are so great that the people of this state can dispense with its very existence, not only without injury to their aggregate interests, but with absolute benefit. The same can be said, although, perhaps, upon less palpable grounds, of other descriptions of property. Intoxicating beverages are by no means the only article of admitted property and of lawful commerce in this state, against which arguments of this sort may be directed. But if such arguments can be allowed to subvert the fundamental idea of property, then there is no private right entirely safe, because there is no limitation upon the absolute discretion of the legislature, and the guarantees of the constitution are a mere waste of words.

The foundation of property is not in philosophic or scientific speculations, nor even in the suggestions of benevolence or philanthropy. It is a simple and intelligible proposition, admitting, in the nature of the case, of no qualification, that that is property which the law of the land recognizes as such. It is, in short, an institution of law, and not a result of speculations in science, in morals, or economy.

These observations appear to me quite elementary, yet they seem to be necessary in order to exclude the discussion of extraneous topics. They lead us directly to the conclusion that all property is alike in the characteristic of inviolability. If the legislature has no power to confiscate and destroy property in general, it has no such power over any particular species. There may be, and there doubtless are, reasons of great urgency for regulating the trade in intoxicating drinks, as well as in other articles of commerce. In establishing such regulations merely, the legislature may proceed upon such views of policy, of economy, or morals, as may be addressed to its discretion. The whole field of discussion is open, when the legislature, keeping within its acknowledged powers, seeks to regulate and re-

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strain a traffic, the general lawfulness of which is admitted ; but when the simplest question is propounded, whether it can confiscate and *destroy* property lawfully acquired by the citizen in intoxicating liquors, then we are to remember that all property is equally sacred in the view of the constitution, and therefore that speculations as to its chemical or scientific qualities, or the mischief engendered by its abuse, have very little to do with the inquiry. Property, if protected by the constitution from such legislation as that we are now considering, is protected because *it is property* innocently acquired under existing laws, and not upon any theory which even so much as opens the question of its utility. If intoxicating liquors are property, the constitution does not permit a legislative estimate to be made of its usefulness with a view to its destruction. In a word, that which belongs to the citizen in the sense of property, and as such has to him a commercial value, cannot be pronounced worthless or pernicious, and so destroyed or deprived of its essential attributes.

Sir WILLIAM BLACKSTONE, who wrote of the laws of England nearly a century ago, said :—

“ So great is the regard of the law for private property, that it will not authorize the least violation of it, no, not even for *the general good of the whole community*. If a new road, for instance, were to be made through the grounds of a private person, it might, perhaps, be extensively beneficial to the public; but the law permits no man, or set of men, to do this without the consent of the owner of the land. In vain may it be urged that the good of the individual ought to yield to that of the community, for it would be dangerous to allow any private man, or even any public tribunal, to be the judge of this common good, and to decide whether it be expedient or no. *Besides, the public good is in nothing more essentially interested, than in the protection of every individual's private rights, as modelled by the municipal law.* In this and similar cases the legislature alone can, and frequently does interfere, and compel the individual to acquiesce. But how does it interpose and compel? Not by absolutely stripping the subject of his property, in an

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arbitrary manner, but by giving him a full indemnity and equivalent for the injury thereby sustained." (*1 Bl. Com.* 139.)

While this language of the English commentator by no means expresses the full force of the limitation imposed upon the legislature by the people of this state in their written constitution, it contains, nevertheless, a vindication of the sanctity of private property as against theories of public good, eminently applicable to our own condition and times.

In a government like ours, theories of public good or public necessity may be so plausible, or even so truthful, as to command popular majorities. But whether truthful or plausible merely, and by whatever numbers they are assented to, there are some absolute private rights beyond their reach, and among these the constitution places the right of property.

The views thus far expressed, the substance of which I think must command a general assent, would seem to narrow the field of inquiry. Do the prohibitions and penalties of the "Act to prevent Intemperance, Pauperism and Crime," pass the utmost boundaries of mere regulation and police, and by their own force, assuming them to be valid and faithfully obeyed and executed, work the essential loss or destruction of the property at which they are aimed? If they do, then, so far as I can see, nothing remains, except to apply the provisions of the fundamental law of the state, and the act must be declared unconstitutional and void. In my judgment, they do plainly work this result.

We must be allowed to know, what is known by all persons of common intelligence, that intoxicating liquors are produced for sale and consumption as a beverage; that such has been their primary and principal use in all ages and countries; and that it is this use which has imparted to them, in this state, more than ninety-nine hundredths of their commercial value. It must follow that any scheme of legislation which, aiming at the destruction of this use, makes the keeping or sale of them as a beverage, in any quantity, and by any person, a criminal offence—which declares them a public nuisance—which subjects them to seizure and physical destruction, and denies a

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legal remedy, if they are taken by lawless force or robbery, must be deemed in every beneficial sense, to deprive the owner of the enjoyment of his property.

Such I understand to be precisely the character of this law. The only sales which it permits (*vide* § 2) are for mechanical, chemical and medicinal purposes—and of wine for sacramental use. Even this exception, minute and special as it is, is attended with extraordinary conditions. The person proposing to sell is prohibited, if he pursues any one of some fifteen or twenty lawful avocations; he must be a man of totally abstinent habits; he must give stringent bail, and he must have a good moral character. Sales may also be made to the authorized venders, but as they can only sell for the particular purposes enumerated, of course sales to them cannot be made in contemplation of any other purpose or use.

With these exceptions, so minute and trivial as scarcely to disturb the general scheme, the act is one of fierce and intolerant proscription. It is unlawful to sell intoxicating liquors, to keep them for sale, or with intent to sell, or to keep them at all. (§ 1.) They are declared a public nuisance; (§ 25;) and not only by that declaration, but by another express provision, all legal protection is withdrawn from them. (§ 16.) If the owner attempts to sell them, he can maintain no action for the price; and if they are taken from him by force or fraud he is remediless. (§ 16.)

In other parts of the act special provisions are contained for seizure, judicial condemnation and destruction. (§§ 5, 6, 7, 8, 9, 10, 11, 12 & 13.) But the act by no means waits for the operation of this machinery. Itself pronounces the sentence of condemnation, and the judicial machinery, such as it is, which it provides, are agencies merely to insure the execution of the sentence. Property is lost before the police are in motion, and, I may add, crime is committed without an act or even an intention. On the day the law took effect, it was criminal to be in possession of intoxicating liquors, however innocently acquired the day before. It was criminal to sell them, and, under the

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law, therefore, no alternative was left to the owner, but their immediate destruction. (*Vide* § 4.)

It will be seen, therefore, that, aside from the exceptional cases which have been stated, and as a beverage without exception, intoxicating liquors are laid under the ban of absolute and unqualified condemnation. As property, they are stripped of the fundamental principle of sale, and their commercial value thus annihilated. They are, moreover, devoted to physical destruction. Special agencies for destruction are provided, but before these are set in motion the law itself condemns them as property, in a series of provisions entirely free from ambiguity or doubt. It was said on the argument, that notwithstanding the sweeping prohibitions of sale, the owner might still keep them, and even export them, and so effect a total or partial saving of his property. If this were so, I do not see how it would affect the question under consideration. If laws contrived for the destruction of property within the state are unconstitutional and void, this cannot be upheld, even though special leave be given to the owner to remove it from the state, and so place it beyond the reach of those laws. But the suggestion is founded in a misapprehension of the act. From the instant it took effect, intoxicating liquors could not lawfully be kept a single hour with a view to exportation, or kept at all, except for the special purposes of medicine, the sacrament, or for mechanical or chemical uses. It might be smuggled away, but that would not be the fault of the law. It would be quite as logical to say, that an act to deprive a man of his liberty or life, without a trial, is constitutional, because there is a possibility that he may run away and thus escape.

There are many provisions of this act which were reviewed at length on the argument, and which might now receive a more particular notice. But the summary exposition which has been given is enough for the present purpose. Proceeding upon the admitted hypothesis that the subject thus denounced and proscribed is property, and like other property essentially inviolable, the inquiry will remain whether the constitution does not expressly prohibit such legislation?

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It has been urged upon us, that the power of the legislature is restricted, not only by the express provisions of the written constitution, but by limitations implied from the nature and form of our government: that, aside from all special restrictions, the right to enact such laws is not among the delegated powers of the legislature, and that the act in question is void, as against the fundamental principles of liberty, and against common sense and natural rights. High authority, certainly, has been cited to show that laws which, although not specially prohibited by written constitutions, are repugnant to reason, and subvert clearly vested rights, are invalid, and must so be declared by the judiciary.

In *Calder and wife* agt. *Bull*, (3 Dallas, 386,) Judge CHASE said, "I cannot subscribe to the omnipotence of a state legislature, or that it is absolute and without control, although its authority should not be restrained by the constitution or fundamental law of the state. The nature and end of legislative power will limit the exercise of it. This fundamental principle flows from the very nature of our free republican governments, that no man should be compelled to do what the laws do not require, nor refrain from acts which the laws permit. There are acts which the federal or state legislature cannot do, without exceeding their authority. There are certain vital principles in our free republican governments which will determine and overrule an apparent and flagrant abuse of legislative power; as to authorize manifest injustice by a positive law, or to take away that security for personal liberty or private property, for the protection whereof government was established."

* * * A few instances will suffice to explain what I mean: A law that punishes a citizen for an innocent action, or, in other words, for an act which, when done, was in violation of no existing law—a law which destroys or impairs the lawful private contracts of citizens—a law that makes a man a judge in his own case—a law that takes property from *A* and gives it to *B*. It is against all reason and justice for a people to entrust a legislature with such powers, and therefore it cannot be presumed that they have done it. *The legislature cannot change*

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innocence into guilt, or punish innocence as a crime, or violate the right of antecedent lawful private contract, or the right of private property."

Chief Justice MARSHALL said, in *Fletcher agt. Peck*, (6 Cranch, 135,) "It may be doubted whether the nature of society and of government does not prescribe some limits to the legislative power; and if any be prescribed, where are they to be found, *if the property of an individual, fairly and honestly acquired, may be seized without compensation?*" (See also *Dash agt. Van Kleeck*, 7 Johns. 477; *Taylor agt. Porter*, 4 Hill, 146—per BRONSON, J.; *Goshen agt. Stonington*, 4 Conn. 225—HOSMER, J.)

I entertain no doubt that, aside from the special limitations of the constitution, the legislature cannot exercise powers which are in their nature essentially judicial or executive. These are, by the constitution, distributed to other departments of the government. It is only the "legislative power" which is vested in the senate and assembly. But where the constitution is silent, and there is no clear usurpation of the powers distributed to other departments, I think there would be great difficulty and great danger in attempting to define the limits of this power. Chief Justice MARSHALL said, (*Fletcher agt. Peck, supra*) "How far the power of giving the law may involve every other power, in cases where the constitution is silent, never has been, and perhaps never can be, definitely stated." That very eminent judge felt the difficulty; but the danger was less apparent then than it is now, when theories, alleged to be founded in natural reason or inalienable rights, but subversive of the just and necessary powers of government, attract the belief of considerable classes of men, and when too much reverence for government and law is certainly among the least of the perils to which our institutions are exposed. I am reluctant to enter upon this field of inquiry, satisfied as I am, that no rule can be laid down in terms which may not contain the germ of great mischief to society, by giving to private opinion and speculation a license to oppose themselves to the just and legitimate powers of government.

Nor is it necessary to push our inquiries in the direction indi-

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cated.—There is no process of reasoning by which it can be demonstrated that the “Act to prevent Intemperance, Pauperism and Crime,” is void upon principles and theories outside of the constitution, which will not also, and by an easier induction, bring it in direct conflict with the constitution itself.

I am brought, therefore, to a more particular consideration of the limitations of power contained in the fundamental law: “No member of this state shall be disfranchised or deprived of any of the rights or privileges secured to any citizen thereof, unless by the law of the land, or the judgment of his peers. No person shall be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use without just compensation.” These provisions have been incorporated, in substance, into all our state constitutions. They are simple and comprehensive in themselves, and I do not perceive that they derive any additional force or meaning by tracing their origin to *Magna Charta* and the later fundamental statutes of Great Britain. In *Magna Charta*, they were wrested from the king as restraints upon the power of the crown. With us, they are imposed by the people as restraints upon the power of the legislature.

No doubt, it seems to me, can be admitted of the meaning of these provisions. To say, as has been suggested, that the law of the land, or “due process of law,” may mean the very act of legislation which deprives the citizen of his rights, privileges, or property, leads to a simple absurdity. The constitution would then mean, that no person shall be deprived of his property or rights, unless the legislature shall pass a law to effectuate the wrong, and this would be throwing the restraint entirely away.

The true interpretation of these constitutional phrases is, that where rights are acquired by the citizen under the existing law, there is no power in any branch of the government to take them away; but where they are held contrary to the existing law, or are forfeited by its violation, then they may be taken from him—not by an act of the legislature, but in the due administration of the law itself, before the judicial tribunals of the state.

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The cause or occasion for depriving the citizen of his supposed rights must be found in the law as it is, or, at least, it cannot be *created* by a legislative act which aims at their destruction. Where rights of property are admitted to exist, the legislature cannot say they shall exist no longer; nor will it make any difference although a process and a tribunal are appointed to execute the sentence. If this is the "law of the land," and "due process of law," within the meaning of the constitution, then the legislature is omnipotent. It may, under the same interpretation pass a law to take away the liberty or life without a pre-existing cause, appointing judicial and executive agencies to execute its will. Property is placed, by the constitution, in the same category with liberty and life.

Clear as this matter stands upon principle, it is equally well-settled by authority. Chief Justice GRIBSON, of Pennsylvania, speaking of a similar clause in the constitution of that state, and of the right of property as protected by it, said,

"What law? Undoubtedly a pre-existing rule of conduct, not an *ex post facto* rescript, or decree, made for the occasion. The design of the convention was to exclude arbitrary power from every branch of the government; and there would be no exclusion of it if such rescripts or decrees were to take effect in the *form of a statute*. The right of property has no foundation or security but the law; and when the legislature shall successfully attempt to overturn it, even in a single instance, the liberty of the citizen is no more." (*Norman* agt. *Heist*, 5 *Watts & Serg.* 193.)

And Chief Justice BRONSON, of this state, in *Taylor* agt. *Porter*, (4 *Hill*, 145,) said, "The words 'law of the land,' as here used, do not mean a statute passed for the purpose of working the wrong. That construction would render the restriction absolutely nugatory, and turn this part of the constitution into mere nonsense."

And again: "The meaning of the section, then, seems to be, that no member of the state shall be disfranchised of any of his rights and privileges, unless the matter be adjudged against him upon trial had according to the course of the common law.

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It must be ascertained judicially that he has forfeited his privileges, or that some one else has a superior title to the property he possesses, before either of them can be taken from him. It cannot be done by mere legislation."

Again he adds, speaking of the words "due process of law," "If the legislature can take the property of A, and give it to B, they can take A himself, and either shut him up in prison, or put him to death. But none of these things can be done by mere legislation."

Chief Justice RUFFIN, of North Carolina, in a very able and elaborate judgment, involving the construction and force of a similar clause in the constitution of that state, laid down the doctrine that the terms "law of the land" do not mean "merely an act of the general assembly. If they did, every restriction upon the legislative authority would be at once abrogated." "In reference," he adds, "to the infliction of punishment and divesting of the rights of property, it has been repeatedly held in this state, and it is believed in every state in the Union, that there are limitations upon the legislative power notwithstanding those words; and that the clause itself means that such legislative acts as profess, in themselves, directly to punish persons, or to deprive the citizen of his property without trial before the judicial tribunals, and a decision upon the matter of right, as determined by the laws under which it vested, according to the course, mode and usages of the common law, as derived from our forefathers, are not effectually 'laws of the land,' for those purposes." (*Hoke* agt. *Henderson*, 4 *Dev.* 18.)

Chancellor KENT (2 *Comm.* 13) says, "The words, 'law of the land,' as used originally in *Magna Charta*, in reference to this subject, are understood to mean, due process of law, that is, by indictment or presentment of good and lawful men: 'and this,' says Lord COKE, 'is the true sense and exposition of those words.' The better and larger definitions of *due process* of law is, that it means law in its *regular course of administration through courts of justice*." (See, also, *Story on the Const.* 661; 10 *Yerger*; 2 *Coke Inst.* 45-50.)

It is plain, therefore, both upon principle and authority, that

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these constitutional safeguards, in all cases, require a judicial investigation, not to be governed by a law specially enacted to take away and destroy existing rights, but confined to the question whether, under the pre-existing rule of conduct, the right in controversy has been lawfully acquired and is lawfully possessed. A proposition so obvious would have deserved less consideration if a singular misapprehension in regard to it did not appear to have prevailed in a decision not now before us for review, but upon the act under examination, pronounced in another branch of the supreme court. (*People agt. Quant, in the 4th district—since reported ante page 88.*)

We are brought, then, directly to the question, does the "Act to prevent Intemperance, Pauperism and Crime," in a just constitutional sense, deprive the citizens of this state of their property in intoxicating liquors? We have already seen that this species of property is just as inviolable as any other. That by the operation of this law its commercial value is annihilated; that it cannot be sold; that it is unlawful to keep it; that all legal protection is withdrawn from it; and that it becomes a public nuisance. Is the owner "deprived" of it within the fair meaning of the constitution? I bring the act to this particular test, because if it can stand with this clause of the constitution, it can with every other.

Now, I can form no notion of property which does not include the essential characteristics and attributes with which it is clothed by the laws of society. In a state of nature property did not exist at all. "Every man might then take to his use what he pleased, and retain it if he had sufficient power; but where men entered into society, and industry, arts and sciences were introduced, property was gained by various means, for the securing whereof proper laws were ordained." (*Tomlin's Law Dic., Property; 2 Bl. Comm. 34.*)

Material objects, therefore, are property, in the true sense, because they are impressed by the laws and usages of society with certain qualities, among which are, fundamentally, the right of the occupant or owner to use and enjoy them exclusively, and his absolute power to sell and dispose of them; and as property

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consists in the artificial impression of these qualities upon material things, so, whatever removes the impression destroys the notion of property, although the things themselves may remain physically untouched.

Nor can I find any definition of property which does not include the power of disposition and sale, as well as the right of private use and enjoyment. Thus BLACKSTONE says, (1 *Comm.* 138,) "The third absolute right of every Englishman is, that of property, which consists in the free use, enjoyment and *disposal* of all his acquisitions, without any control or diminution, save only by the laws of the land."

Chancellor KENT says, (2 *Comm.* 110,) "The exclusive right of using and *transferring* property follows as a natural consequence, from the perception and admission of the right itself."

And again, (p. 320,) "The power of *alienation of property* is a necessary incident to the right, and was dictated by mutual convenience and mutual wants."

By another author, property is defined as an "exclusive right to things, containing not only a right to use those things, but a right to dispose of them, either by exchanging them for other things, or giving them away to any other person without consideration, or even throwing them away." (*Bouvier's Law Dic.* *T. A. property.*)

These definitions are in accordance with the general sense of mankind. Indeed, if any one can define property eliminated of its attributes, incapable of sale, and placed without the protection of law, it were well that the attempt should be made.

The statute under consideration, without reference to its provisions for the seizure and physical destruction of intoxicating liquors, by force of its prohibitions alone, sweeps them from the commerce of the state, and thus annihilates the quality of sale, which makes them valuable to the owner. This is destructive of the notion of property.

I need, perhaps, take no further notice of their qualified vendibility for the sacrament, and the other special uses named in the act. These are only the occasional and incidental uses of the article. It is the general and primary use which is aimed

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at. It is the mass of property which is struck down; and the possible conservation of an extremely insignificant portion, cannot change the character of the law.

No ingenuous advocate of the law will deny that its great characteristic is prohibition, intended to turn back from the channels of commerce important masses of property, and thus, by suppressing the use, to prevent the abuse. To regard the act in any other light would be a fraud upon its entire policy, and upon the views and motives in which it must be supposed to have had its origin. And in order to a full view of the spirit and intent of the law, to simple prohibition, we must add its penalties and its other connected and dependent clauses—the whole forming one scheme, and all tending, with fatal accuracy, to the destruction of property in intoxicating liquors within this state.

Unless, therefore, the right of property in liquor is denied altogether, and this has never been done, or unless they can be distinguished from every other species of property, and this has not been attempted, the act cannot stand consistently with the constitution. The provisions of the constitution should receive a beneficent and liberal interpretation, where the fundamental rights of the citizen are concerned. But, in the case before us, its plain and obvious meaning is enough. "No person can be deprived of his property without due process of law" by the legislature or any other power of the government.

When a law annihilates the value of property, and strips it of its attributes, by which alone it is distinguished as property, the owner is deprived of it according to the plainest interpretation, and certainly within the spirit of a constitutional provision intended expressly to shield private rights from the exercise of arbitrary power.

I have not reached this result without an attentive examination of the arguments which have been urged in favor of an opposite conclusion. Such of them as may appear to have most weight, or to have been most relied on, may here be noticed.

Prominent among these suggestions, our attention has been directed to a supposed analogy between the act under consider-

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ation and the license and excise laws of this and other states, the constitutionality of which is not questioned. I think the analogy does not exist. However difficult it may be to define, with accuracy and precision, the line of separation, there is a broad and perfectly intelligible distinction between what is plainly regulation on the one side, and what is plainly prohibition on the other. In another case great difficulty may attend the inquiry, but not greater certainty than often attends judicial investigations. The inquiry is essentially judicial in its nature; and whenever a case of difficulty arises, it must be met and determined upon its special circumstances, and by the aid of such lights as can be obtained. In the present case, the difficulty suggested is not perceived. The statute we are examining passes the utmost limit of regulation, and does not even wear a disguise. It is plainly prohibitory in every feature, and in its entire scope and policy. Some of the excise acts referred to were of great stringency, considered as regulations merely of traffic in intoxicating liquors; but none of them totally prohibited their sale as a beverage, or denied to them as such, the essential qualities of property, or placed them without the protection of the laws.

It is certain, that the legislature cannot totally annihilate commerce in any species of property, and so condemn the property itself to extinction. It is equally certain that the legislature can regulate trade in property of all kinds. Neither of these propositions is denied; but they necessarily lead to another—that between regulation and destruction there is somewhere, however difficult to define with precision, a line of separation. All reasoning, therefore, in favor of upholding legislation which belongs to one class, because it is often difficult to distinguish it from that which belongs to the other, must be fallacious, because it is simply reasoning against admitted conclusions.

The provision in the federal constitution, declaring that no state shall pass laws impairing the obligation of contracts, and the course of judicial decision under that provision, may be referred to as illustrating the distinction between legislation which

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is remedial merely, and that which is subversive of the rights intended to be saved. Under this provision the constitutionality of state laws has often been examined, and the difficulty of distinguishing between statutes which regulated the remedy and those which impaired or subverted the right, has been great and acknowledged. But the distinction itself has been steadily maintained. Neither the federal nor the state courts have ever shrunk from the inquiry; and laws which transcended the limits of regulation merely, and directly or indirectly invaded the right, have been uniformly adjudged to be void.

Nor could we escape the kindred inquiry in the case before us, although it were attended with much greater difficulty than we believe it to be. Does the statute under consideration simply regulate, or does it destroy an admitted species of property, in which millions of value are invested? As this question is answered, the act must stand or fall; and in our judgment but one answer can be given.

Besides the license and excise laws, our attention has been drawn to other legislative enactments, producing, in their result, great injury to private property, the constitutionality of which has been admitted or adjudged. The embargo act of congress, in 1807, (*2 Statutes at Large*, 451,) is mentioned as one of these examples of legislation. I do not perceive any analogy which can influence the present question. That was an act which simply prevented "all ships and vessels in ports and places within the limits or jurisdiction of the United States" from sailing upon any enterprise of *foreign commerce*. It is not important to inquire under what particular clause of the federal constitution the power was derived to enact such a law. That it went to the utmost verge of constitutional power has been universally conceded. (*3 Story on the Constitution*, 163.) It is enough for the present purpose to say, that it was recommended and adopted as a measure of *protection* to property, and not of annihilation.

In the language of Justice STORY, (*id.* 161,) "It was avowedly recommended as a measure of safety for our vessels, our seamen and our merchandise, from the threatening dangers from

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the belligerent powers of Europe." In other words, if was an act of conservation, and not of destruction, although in its effect it bore with great severity upon the interests of the commercial states, and upon the property of individuals. It did not aim at the extinction of any species of property, or of any of its attributes. If congress, proceeding upon a theory that all foreign commerce was injurious to the interests of the nation, and the morals and habits of the people, had passed an act intended to destroy it perpetually, and for that purpose confiscating ships and vessels, prohibiting their sale, making it unlawful to keep them with intent to sell, or keep them at all, and declaring them a nuisance, and such a law had been adjudged valid, then, and I think not till then, an analogy might be traced having something to do with the question before us.

Statutes conferring upon municipal corporations powers, which, in their execution and ultimate result, inflict incidental or consequential injury upon the property of individuals—injury for which it is said the law affords no remedy—have been adjudged constitutional. In legislation of this kind it is also supposed some warrant can be found for the act under consideration. Here, again, the analogy fails. Laws of this character proscribe no species of property. They may injure it in their remote and accidental result, but they do not, like this act, say it shall not be allowed to exist at all, or strike directly at the qualities and attributes, without which it can have no legal existence. The constitutional requirement is, that no person shall be *deprived of his property*, and that private property shall not be taken for public use without just compensation. It is nowhere declared, that in the exercise of the admitted functions of government, private property may not receive remote and consequent injury without compensation. (*See Radcliff's Executors* agt. *The Mayor of Brooklyn*, 4 Comt. 195.)

The authorized destruction of buildings in the city of New-York, by direction of the mayor and aldermen, in order to prevent the spread of a conflagration, (2 R. L. of 1813, p. 368, § 81,) has been referred to as a constitutional exercise of legislative power which deprives a citizen of his property. It is

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enough to say of such statutes that they are founded upon and are mere regulations of the common-law right of any person to destroy property in a case of immediate and overwhelming necessity to prevent the ravages of fire or pestilence. (2 *Kent Comm.* 339; *Russell* agt. *The Mayor, &c., of New-York*, 2 *Denio*, 461; 17 *Wend.* 285; 25 *id.* 157.) Statutes of this description merely appoint a municipal agent to judge of the emergency, and direct the performance of acts which any individual might do at his peril without any statute at all. If such legislation can prove anything to the present purpose, it would show that these powers of destruction may be invoked in order to reform the morals and habits of society, and therefore that authorized agents of the legislature, or individuals without authority, may go forth on a roving commission to seize and destroy all intoxicating liquors within the borders of the state, and plead an overruling necessity as a justification of their lawless acts. This would be a mission which philanthropists and reformers have not yet undertaken, and certainly which no judge or lawyer would defend.

Other examples of legislation have been cited which may be grouped together and considered at a single view. Laws of quarantine, which detain ships for a limited period, coming from places where pestilential diseases exist; laws against smuggling, which forfeit the goods and the vessels in which they are conveyed, for non-payment of impost duties; laws against gambling, which forfeit the tools and implements with which the offence is committed; laws against horse-racing, under which it is said the horses unlawfully used are forfeited; laws against selling liquors to Indians, under which the liquors themselves may be forfeited. Examples of this sort are supposed to have a peculiar application to the question, because, by the force of statutes of admitted validity, property is specifically forfeited, and so the owner deprived of it. There is, however, a fallacy in all reasoning and illustration from such sources, which can be readily exposed.

And the precise and fatal difficulty in the argument is, that the only resemblance between the statutes referred to, and the one

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under consideration, is in the *character of the punishment*. The prohibitions themselves are totally unlike, and relate mostly to different subjects. That the punishment for violating such prohibitions is similar, or even the same, amounts to nothing, when the question is whether the prohibitions themselves, or any one of them, is constitutional or valid. Take, for example, the instance of smuggling. No one doubts the power of congress to prohibit the importation of goods without the payment of duties, nor, consequently, that the offender may be punished by a forfeiture of the goods, by pecuniary fine, or imprisonment. But whether the legislature of this state has power to prohibit the keeping or sale of property in general, or any particular species, is the precise question now to be determined. When that is first established, then the owner who violates the prohibition may lose his property, or be fined, imprisoned, banished, or put to death.

It is certainly a simple proposition, that an admitted public offence against a constitutional statute may be punished by loss of property, of money, of liberty, or of life; but how this tends to show that another statute, prohibiting things of a totally different character, and similar only in its sanction or penalty, is valid, and the offence itself constitutionally created, is what I have been unable to perceive. In a word, to trace an analogy between two statutes in the manner of enforcing them, or punishing the offender, does not advance a step toward proving that either the one or the other is constitutional, or the contrary.

The illustration from the statutes referred to, and all others which can be referred to, fails for another reason of great significance, which seems to have been overlooked by those who assert the validity of the prohibitory law. It is an entire misconception of the law itself to say that the species of property to which it relates is *forfeited for a violation* of its provisions. It is simply *extinguished* by the force of the prohibitions themselves. In other parts of the act, pecuniary penalties and imprisonment are inflicted, but the loss of property is not exacted as a forfeiture at all in any just or ordinary sense of the term.

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It is quite absurd to say of a law which enacts, in substance, that property of a particular species shall no longer exist, that it imposes a forfeiture of such property as the punishment for violating the prohibition. There is no offence except the misfortune of being the owner. A forfeiture of goods implies a title to them, good against all the world; but if this law is valid, then the owner has no title to lose. Analogies for such legislation will be sought for in vain.

In respect to one of the statutes which have been mentioned, that which prohibits the sale of intoxicating liquors to Indians, it should be further observed, that Indians are considered as persons *inops consilii* under the tutelage of government, and in the same category with minors, habitual drunkards, &c. These classes of persons are particularly the subjects of governmental care; and to concede that the legislature may constrain or prohibit the sale of spirituous liquors to them, is only admitting that it may regulate traffic in any species of property—an admission which suggests the distinction already sufficiently considered between the power to regulate and the power to destroy.

It has been said, also, that the admitted power of taxation may be so exercised under legislative authority as greatly to impair the value of private property. This is undoubtedly true, but it throws no light upon the present question. The power may be wisely or unwisely, justly or unjustly exercised; but as a power, it rests upon the theory that full compensation is received by the individual in the benefit conferred by the tax itself. The support of government, and other objects of public utility promoted by taxation, are supposed to return to the individual the value which has been taken from him as his share of the public burden. This is neither depriving a man of his property, in a constitutional sense, nor taking it for public use under the right of eminent domain.

Again, it may be suggested, if, in a given case, it could be plainly seen that the confiscation and extinction of a species of property were the essential object of a statute, it should be

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declared unconstitutional, although disguised under the forms of taxation.

It has also been supposed that some authority for legislation of this kind is found in the observation of one or two of the judges of the supreme court of the United States, delivered where the license laws of Massachusetts, Rhode Island and New-Hampshire, were examined in that court. (5 *Howard*, 504.) This is quite a mistake. The question involved and determined was, that the excise laws of those states did not conflict with the authority of congress to regulate commerce with foreign countries, and among the states. Whatever was said beyond that was, of course, *obiter dicta* merely, and even as such had no reference to the limitations of legislative power contained in state constitutions.

It is scarcely necessary, perhaps, to observe, that in the views which have been expressed, it is not intended to narrow the field of legislative discretion in regulating and controlling the traffic in intoxicating liquors. We only say, that in all such legislation, the essential right of the citizen to his property must be preserved—a right which includes the power of disposition and sale, to be exercised under such restraints as a just regard, both to the public good and private rights, may suggest.

I am not insensible to the delicacy and importance of the duty we assume in overruling an act of the legislature, believed by so many intelligent and good men to afford the best remedy for great and admitted evils in society; but we cannot forget that the highest function intrusted to us is that of maintaining inflexibly the fundamental law. And believing, as I do, that the Prohibitory Act transcends the constitutional limits of the legislative power, it must be adjudged to be void.

The judgment of the supreme court and of the court of sessions must, therefore, be reversed.

SELDEN, J. The question which lies at the threshold of this case of Toynbee, and which should be determined in advance of every other, is, whether the act for the prevention of intemper-

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ance, pauperism and crime, considered in reference to its object, the means adopted to secure that object, and its alleged effect in virtually annihilating a large amount of property, is void, as being without the pale of legislative power. It is claimed, 1. That, irrespective of any positive restrictions, the principles of natural equity and justice set bounds to the power of the legislature, which are transcended by this law. And, 2. That it is in conflict with the express provisions of the constitution.

In examining this subject, speculative opinions in regard to the wisdom of the act, or the beneficial results likely to flow from it, can have nothing whatever to do with a question which depends upon abstract principles of governmental law—principles which cannot be moulded to meet the views or interests of any portion of the people. It is a question not of expediency, but of power.

Every sovereign state possesses within itself absolute and unlimited legislative power. It is true, that as government is instituted for beneficent purposes, and to protect the welfare of the governed, it has no moral *right* to enact a law which is plainly repugnant to reason and justice. But this principle belongs to the science of political ethics, and not that of law. There is no arbiter beyond the state itself to determine what legislation is just. Whatever, therefore, is to be declared by the ultimate power of a state, as there can be no appeal, must, in view of the law, be taken to be just and right. The union of the functions of making and deciding upon laws, constitutes, of necessity, absolute legislative power. While, therefore, the *right* of a sovereign state to pass arbitrary and tyrannical laws may, its legal *power* cannot, be denied. This is self-evident, and needs no proof. I speak, of course, of a state as a whole, where all its powers are *concentrated* in the hands of the people at large, or of one or more of its members.

It follows, that if a society of people, wishing to form an organized government, should simply create the three essential departments, vesting *the whole* executive power in one, the legislative in another, and the judicial in a third, as the three departments combined would possess all the powers which be-

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longed to the people in their collective capacity, the legislative department could make any law which the people themselves could have made—arbitrary, oppressive, or otherwise; unless, under such a distribution of the governmental powers, some authority is vested in the judiciary, to pass upon the propriety or justice of the laws.

But it is evident that this is legislative and not judicial power. It is necessarily to be exercised, in the first instance at least, when the law is passed, and obviously constitutes the most essential portion of the duty of the legislature itself. To suppose the same power vested in the judiciary, tends to confound the distinction between the two departments. Besides, when exercised by the latter, it becomes a supervisory and appellate power, and *thus virtually subversive of all legislation*. It is clear, therefore, in my judgment, that in a perfectly *natural and simple* distribution of the governmental powers, it is not within the province of the judiciary to pronounce *any* act of the legislature void. It may, however, acquire this right through an artificial distribution of those powers by means of the organic law.

Let us look, then, at our state constitution: Section 1, Art. 3, declares, that "The legislative power of this state shall be vested in a senate and assembly." This means, of course, *the whole* legislative power. The words are general and unlimited—nothing is reserved. It was decided by this court in the case of *Barto* agt. *Himrod*, (4 Seld. 483,) that the people had parted with all their power of legislation, except in the single case provided for in Art. 7, § 12.

Why, then, as it has been shown that the people could make any law, just or unjust, is not the legislature equally absolute? It is because, by other clauses in the constitution hereafter to be noticed, a portion of this absolute power has been transferred to the judiciary. Not, it is true, in direct terms; but the constitution, being the result of legislation by the people themselves before parting with their power, is the paramount law. When, therefore, any law passed by the legislature conflicts with this, the judiciary pronounces between them, as it does between the acts of two successive legislatures, and the para-

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mount law prevails. It will be seen, that in this mode a restriction upon the power of the legislature is effected without confounding the distinction between the two departments, as the judiciary continues to exercise only its appropriate judicial functions.

To determine, then, the extent of the law-making power, we have only to look to the provisions of the constitution. It has, and can have, no other limit than such as is there prescribed; and the doctrine that there exists in the judiciary some vague, loose, and undefined power to annul a law, because in its judgment it is "contrary to natural equity and justice," is in conflict with the first principles of government, and can never, I think, be maintained.

I am aware that some eminent judges, when the question was not before them, have expressed a belief in the existence of such a power; but no court has ever, I believe, assumed to declare an explicit enactment of the legislature void on that ground.

BLACKSTONE, in his Commentaries, after referring to the doctrine advanced by some other writers on this subject, that acts of parliament "contrary to reason" are void, says, "But if the parliament will positively enact a thing to be done which is unreasonable, I know of no power in the ordinary forms of the constitution that is vested with power to control it; and the examples usually alleged in support of this sense of the rule do none of them prove, that where the main object of a statute is unreasonable, the judges are at liberty to reject it; for that were to set the judicial power above that of the legislature, *which would be subversive of all government.*" (1 Black. Com. 91.)

Christian, in his Commentary upon this passage, says, "When the signification of a statute is manifest, *no authority*, less than that of parliament, can restrain its operation." (See note to Black.) These authorities, it is true, have reference to the British constitution, but the following relate to those of our own country:—

Lieber, in his work on Civil Liberty and Self-Government, says, that the state legislatures have "the right, as a general

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rule, to do all that seems necessary for the general welfare and is not *specially prohibited.*" He suggests no exceptions. (See ch. 15, § 25.)

Mr. Justice IREDELL, in the case of *Calder* agt. *Bull*, (3 *Dall.* 386,) where this question was incidentally considered, uses the following emphatic language : " If, then, a government, composed of legislative, executive and judicial departments, were established by a constitution which imposed no limits on the legislative power, the consequence would inevitably be, that whatever the legislative power chose to enact, would be lawfully enacted, and the judicial power could never interpose to pronounce it void."

Chief Justice CHURCH, of Connecticut, also, in the case of *The City of Bridgeport* agt. *The Housatonic Railroad Company*, (15 *Conn. R.* 475,) expresses his views thus : " There may not often be any great difficulty in determining what are the principles of natural justice, nor what would tend to undermine that which theorists may suppose to be the fundamental principles of the social compact, especially by those who acknowledge the precepts and obligations of revealed religion ; yet, these principles are not always of easy and undoubted application to the infinitely varied forms of human action ; and we know of no other municipal power which can more safely make such application than the legislature ; and as a court, although we may dissent from its conclusions, yet *we disclaim any right to disregard them*, for no other reason than that we might consider them unreasonable, impolitic, or unjust."

I agree with the learned chief justice, that this power of determining what laws are expedient and just, which must of necessity be lodged somewhere, may be as safely reposed in the legislature, which returns its power so frequently through the elections into the hands of the people, as in the judiciary. The remedy for unjust legislation, provided it does not conflict with the organic law, is at the ballot-box ; and I know of no provision of the constitution, nor fundamental principle of government, which authorizes the minority, when defeated at the polls upon an issue involving the propriety of a law, to appeal to the

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judiciary, and invoke its aid to reverse the decision of the majority, and nullify the legislative power.

This brings me to the consideration of the second ground, upon which it is claimed that the law, as a whole, is void, viz.: That it is inconsistent with the letter or spirit of the express provisions of the state constitution. The particular clauses with which it is alleged to conflict, are those which provide, 1. That "no member of this state shall be disfranchised, or deprived of any of the rights or privileges secured to any citizen thereof, unless by the law of the land, or the judgment of his peers." 2. That no person shall "be deprived of life, liberty, or property, without due process of law."

The first of these clauses, which had its origin in Magna Charta, brief as it is, embodies the most essential guaranties against the exercise of arbitrary power, which that instrument contained. Its meaning as there used is plain, when we consider that it was the result of a struggle which had lasted for more than a century between the English people and the Norman kings, who had supplanted the laws and customs of the Anglo-Saxons, and established in their place the prerogatives of royalty. The English yeomanry, at whose instance this clause was inserted, meant by the terms "law of the land," **THE ANCIENT SAXON OR COMMON LAW**. To put any other construction upon it would render the clause utterly unmeaning. At that period in English history the king exercised legislative power; and if by "law of the land" was meant any law which the king might enact, the provision was a nullity.

But the meaning was rendered more clear by the paraphrase of this article of Magna Charta, which was inserted in a subsequent statute, securing privileges to the people, passed in the reign of Edward III, in which the clause "but by the law of the land or the judgment of his peers" was changed to the words, "without being brought to answer by the process of law."

This change shows that the object of the provision was, in part at least, to interpose the judicial department of the government as a barrier against aggressions by the other departments.

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Hence, both courts and commentators in this country have held that these clauses, *in either form*, secure to every citizen a judicial trial before he can be deprived of life, liberty, or property. (*Hoke* agt. *Henderson*, 4 *Dev.* 1; *Jones* agt. *Perry*, 10 *Yerger*, 59; *Taylor* agt. *Porter*, 4 *Hill*, 140; *Embry* agt. *Conner*, 3 *Coms.* 511; 2 *Kent Comm.* 13; 3 *Story Comm. on the Cons.* § 1788.)

Does the statute in question, then, deprive any class of citizens of their property without "due process of law?"

Property is the *right* of any person to possess, use, enjoy and dispose of a thing. The term, although frequently applied to the thing itself, in strictness, means only the *rights* of the owner in relation to it. (*Bouvier's Law Dic.*; 1 *Black. Comm.* 138; *Webster's Dic.*, &c.) A man may be *deprived* of his property in a chattel, therefore, without its being seized, or physically destroyed, or taken from his possession. Whatever subverts his *rights* in regard to it annihilates his property in it. It follows, that a law which should provide, in regard to any article in which a right of property is recognized, that it should neither be sold or used, nor kept in any place whatsoever within this state, would fall directly within the letter of the constitutional inhibition, as it would, in the most effectual manner possible, deprive the owner of his property, without the interposition of any court, or the use of any process whatever.

It may be said that the constitutional provisions in question cannot, in the nature of things, apply to a case where a law enacted for beneficent purposes operates *directly* upon its subject, and thus accomplishes *per se* the end in view; that in such a case it is impossible to interpose any judicial action between the enactment and its execution; and that the clause can only apply to cases where there is to be some manual interference with the rights of person or of property.

But there is no such limitation in the constitution; and the few guarantees it contains should not be curtailed by any narrow or refined process of interpretation. Such a construction would virtually nullify the provision—as the most oppressive and tyrannical ends may be accomplished by simply withdraw-

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ing from individual rights the protection of law. All vested rights to franchises would be placed, by this interpretation, so far as the state constitution is concerned, entirely at the mercy of the legislature. To give the clause, therefore, any value, it must be understood to mean, that no person shall be deprived, by any form of legislation or governmental action, of either life, liberty, or property, EXCEPT AS THE CONSEQUENCE of some judicial proceeding, appropriately and legally conducted. It follows, that a law which, by its own inherent force, extinguishes rights of property, or compels their extinction, without any legal process whatever, comes directly in conflict with the constitution.

Does the act in question do this?

I shall consider the objections to the first four sections, which embrace the prohibitory features of the act, with the specific penalties annexed to its violation, by themselves, as they have no necessary connection with those made to the subsequent sections. If these four sections *virtually deprive* the owners of spirituous liquors of their property, without legal process, they are void, if my interpretation of the constitution is sound.

It is not sufficient that they impair the *value* of the property, in ever so great a degree, because this *destroys* no right. It leaves to the owner *unimpaired*, his *right* to keep, to use, and to dispose of the article. It does not, therefore, *deprive* him of any right of property. All regulations of trade, with a view to the public interest, may, more or less, impair the value of property; but they do not come within the constitutional inhibition, unless they *virtually* take away and destroy those rights in which property consists; this destruction must be, for all substantial purposes, *total*. Not that a merely *colorable* preservation, of some minute and trivial interest, would uphold the act. A substantial right of property must be saved; and the provisions must be such as may fairly be considered as intended to *regulate*, rather than subvert and destroy the property.

What, then, is the general scope and object of the first four sections of the act? Plainly, to prohibit the sale of intoxicating liquors, for all except *mechanical*, *chemical* and *medicinal*

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purposes, and to limit their sale for those purposes to a particular class of persons. Is there anything in these objects which, if properly carried out, would transcend the limits of the legislative power? I think not. The legislature, in my judgment, possesses the right to prescribe the places where, the persons by whom, and the purposes for which spirituous liquors may be sold, provided that, under color of doing this, it does not virtually deprive the owner of his property in them.

So far as the places where, and the persons by whom, sales may be made, this act is, perhaps, more stringent than the excise laws which it supersedes. The increase of rigor is in the purposes for which such liquors may now be sold. But the privilege of selling for "mechanical, chemical and medicinal purposes" is not, I think, so trivial as to be justly regarded as merely *colorable*. The consumption for the chemical and mechanical arts must be considerable, and that for medicinal purposes will be found, I apprehend, to be still greater. Besides, as the law would operate to check the manufacture and importation of liquors, the stock on hand would, if permitted, have been ultimately required for purposes deemed by the law itself legitimate.

If, then, the law had suffered the liquors on hand, when it went into effect, to be gradually absorbed by the then privileged uses, the prohibitory features contained in the first four sections would not, I think, have conflicted with the constitution. But there is one provision in the first section of the act which, when taken in connection with the fourth section, cannot, I think, be reconciled with any just views of legislative power.

That section declares, in substance, first, that intoxicating liquors, except as afterwards provided, shall neither be sold, or kept for sale, or with intent to be sold, in any place whatever; nor be given away, or kept with intent to be given away, anywhere but in a private dwelling-house. These provisions, although they abrogate the right of sale, do not prohibit the liquors from being kept, provided no design is entertained of selling them; nor do they prohibit their being used by the owner. So far the section may not conflict with the constitution. But

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it proceeds, "Nor shall it be kept or deposited *in any place whatsoever*," except in such dwelling-house as above described, or in a church or place of worship for sacramental purposes, or in a place where either some chemical, or mechanical, or medicinal art, requiring the use of liquor, is carried on as a regular branch of business; or while in actual transportation from one place to another, or stored in a warehouse, prior to reaching its place of destination.

This last clause is not qualified by any provision as to the *intent* with which the liquors are kept. It is an *absolute prohibition* against their being kept *anywhere* but in the excepted places, although the owner may have no intention either to use, sell, or give them away; and the fourth section declares a *violation* of this clause to be a *misdemeanor*, and imposes a penalty of \$50 for the first offence.

Now what, under this law, is the condition of a person having spirituous liquors on hand on the day when the law takes effect? These liquors, or the rights of the owner in them, are property, and as such entitled to the protection of the constitution. What, then, is the owner to do? If he does *nothing*, he is guilty of a misdemeanor, because it is a violation of the act *to keep* the liquors *anywhere* out of the excepted places, without reference to the interest of the owner. Unless, therefore, he obtains the right to sell, or deposits the liquor in one of the excepted places, he must *destroy* it, or be liable to indictment and punishment as a criminal. The act reduces him to this alternative: it does not permit him to dispose of his liquors even to those authorized to sell. In this respect it is inconsistent with itself. It admits the value of such liquors for certain purposes, and yet prohibits their sale for those very purposes.

If it be conceded that the legislature has not the power to pass a law directing a *sheriff*, or other officer, *to destroy* those liquors wherever he can find them, without any process whatever, then the constitutionality of the provision under consideration cannot, I think, be maintained; because there can be no material difference between directing an officer to destroy them, and directing the owner himself to do it; nor between enacting,

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in so many words, that the latter shall destroy them, and placing him in a situation which subjects him to conviction and punishment as a criminal unless he does it. How is it possible to deprive a man more effectually of his property than to enact that he shall be deemed guilty of a misdemeanor, and be liable to a penalty, *if he keeps it for any purpose?* This is precisely what the legislature has, in substance, done—since the only doors of escape left open to the owner are entirely illusory. They are, either to qualify himself under sections two and three to sell, or to deposit his liquor in one of the excepted places.

As to the first, he may be able to obtain the necessary security, or to make oath that he does not use intoxicating liquor as a beverage. The law does not make such use a crime; nor does the constitution withdraw its protection in consequence of it. Such a man, then, although disposed to submit to the law, and not to sell for any authorized purpose, cannot save his property, even for those purposes which the law itself sanctions.

It may be said that he may remove the liquors to one of the excepted places. This might be done in some instances, and in small quantities. Some men own dwelling-houses, and some do not. Some might have access to mechanical or manufacturing establishments, and some would not. But the legislature has no power to compel the destruction of even the smallest quantity of liquor, without a previous judicial condemnation. The idea of depositing *all* the liquor on hand when the law took effect in those excepted places is plainly illusory. The suggestion that the owners might save their property by exportation is equally so. Admitting the right of the legislature to compel any class of citizens to remove their property out of the state, we cannot know, judicially, that an article, the sale of which is prohibited, and which is declared a nuisance in our own state, would be admitted as an article of merchandise into any other.

While, therefore, I do not question the constitutionality of the general objects of the Prohibitory Law, and fully concede the power of the legislature to prohibit the sale of intoxicating liquors, for all except mechanical, chemical and medicinal pur-

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poses, I cannot admit that it has the right to compel their *immediate and unconditional destruction*, as is, I think, substantially done by this law. The guarantees of the rights of property, which the constitution affords, as my investigations in this case have satisfied me, are slender at the best, and I am unwilling so to interpret as entirely to nullify them.

There is one other argument, in connection with this branch of the case, which I will notice here. It is said, that the legislature has the conceded power to authorize the destruction of private property in certain cases for the protection of great public interests; as, for instance, the blowing up of buildings during fires, and the destroying of infected articles in times of pestilence; and that the legislature is necessarily the sole judge of the public exigency, which may call for the exercise of this power.

The answer is, that the legislature does not, in these cases, *authorize* the destruction of property; it simply *regulates* that inherent and inalienable right, which exists in every individual, to protect his life and his property from *immediate* destruction. This is a right which individuals do not surrender when they enter into the social state, and which cannot be taken from them. The acts of the legislature, in such cases, do not confer any right of destruction which would not exist independent of them; but they aim to introduce some method into the exercise of the right. (*See the able opinion of Senator SHERMAN in Russell agt. Mayor of New-York, 2 Denio, 46.*)

It has never yet been judicially decided in this state, so far as I am aware, that the officers upon whom statutes of this kind purport to confer power to destroy buildings to prevent the spread of fires, would be justified in exercising the power in a case where it could not be properly exercised independent of the statute; and it may well be doubted whether the legislature can add to the extent or force of the natural right.

Again: the enactment of quarantine laws, by force of which not only is property destroyed, but personal liberty restrained, is the exertion, by the body politic, of the same power of self-preservation, which is possessed by individuals. Their justifi-

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cation rests upon the *immediate* and *imminent* danger to life and health which they are enacted to avert. If we admit the truth and force of all the reasoning upon which the statute before us is based, it will still be impossible to bring it within the range of this power. As well might an individual argue that because he has a right to protect his life or property from immediate destruction, he has, therefore, a right to resort to any measures he may deem necessary to guard against remote and contingent dangers. It is clear, therefore, that no argument drawn from these and kindred enactments, can be of any weight in determining the question here.

The conclusion to which I am thus brought is necessarily subversive of the entire law in its present form. For, although when only part of an act is unconstitutional, and that part is entirely separable from the remaining portion, the court will limit its condemnation to the part which conflicts with the constitution, yet this cannot be done where, as in this case, in a single section, several acts in relation to the same subject matter, and connected in one sentence, are forbidden, and in another section all these acts are indiscriminately declared to be crimes, and *one common penalty* is annexed to each. The same provision cannot be both valid and void, as would be the case if it should be held that the penalties imposed by section four could be enforced as to part of the acts prohibited in section one, and not as to others.

It may be said, that although the legislature has not the power to annihilate *existing rights* of property in any article, it may nevertheless make it unlawful to acquire such rights in future; and may therefore enact, that all rights of property in a particular article, *thereafter acquired*, shall be null, and that the article itself shall be destroyed; and hence, that the present law may be enforced as to all rights not shown to have existed when the law took effect.

But conceding the power of the legislature to make such a law, it cannot support the present act, which operates indiscriminately upon all rights of property in the article in question, without regard to the time when they were acquired.

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To hold the law valid and operative as to property acquired after it took effect, and void as to rights previously existing, would tend to the constant recurrence of the question before the courts as to its constitutionality, and to *repeated judgments* of condemnation of the law. There are serious objections to this on grounds of public policy, which requires that collisions between the different departments of government should be as few and as brief as possible. If the law was so framed that proof on the part of the defendant, that his rights of property involved in the case had existed before the act took effect, could be construed into a defence under the act itself, this objection would be removed. But it is clearly otherwise. Such proof would have no tendency to exempt the defendant or his property from the penalties of the law, except by calling upon the court to pronounce it unconstitutional. Thus the courts would be required, over and over again, to declare the same legislative provisions both valid and void, as applicable to different classes of cases. This has been in some instances, but with doubtful propriety, tolerated in purely civil cases, but never, I believe, in respect to penal and criminal legislation.

It is not only liable to the objection already suggested of calling into repeated action the ultimate judicial power of passing upon the validity of the acts of a co-ordinate branch of the government; but it would tend directly to encourage experimental legislation. If the legislature may, in a single provision, encroach *ad libitum* upon the constitution, without other effect than to call upon the courts to limit its operation to cases within the purview of legislative power, nearly all motive for a careful regard for constitutional rights in legislation would be removed, and an onerous burden imposed upon the courts. The general rule on this subject is, that where part of a law is in conflict with the constitution, and that part is entirely separable from the residue, so that other portions of the law can be enforced without reference to it, there the unconstitutional part only will be condemned. But where the legislative provision is indivisible, and the necessary discrimination has, as in this case, to be made at the trial, so that the rights invaded can only be pro-

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tected by *repeated* judgments against the validity of the law, although there may be a class of cases to which it might properly apply, the provision is wholly void. The law, therefore, must be revised, and the proper discrimination made, before it can be enforced.

I shall notice but a single additional point arising upon that portion of the law, which is designed to enforce its penalties.

Section seventeen contains important provisions which are made applicable to every prosecution under the act; and if the law is to be revised, it is undoubtedly desirable that the views of this court upon that section should be known. The question arising upon it is, in my view, of greater importance than any other which the law presents, as it goes to test the value of those clauses of the constitution upon which our rights of personal security rest.

The second branch of the section provides, that upon the trial of every complaint under the act for an unlawful sale of liquor, the defendant shall not be permitted to justify under the second section, (the only way in which it is possible to justify,) unless he shall—1. Admit the sale, which, by the previous clause, is converted into *prima facie* evidence of guilt; 2. Swear to his innocence, *i. e.*, his belief as to the use which the purchaser intended to make of the liquor; and, 3. State the reasons upon which his belief was founded.

Can this provision be reconciled with that clause in § 6, Art. 1, of the constitution, which provides that "in any trial, in any court whatever, the party accused shall be allowed to appear and defend in person and with counsel," taken in connection with the provision in the same section, that no person shall "be deprived of life, liberty, or property" without "due process of law?" Of what value is this right "to appear and defend," if the legislature can clog it with conditions and restrictions which substantially nullify the right? The constitution says, every man shall have a right "to defend." The legislature says, you may defend, *provided* you first admit yourself *prima facie* guilty. Can these provisions be reconciled?

In *Greene* agt. *Briggs*, (1 *Curtis R.* 811,) *CURTIS*, J., speaking

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of the provisions of the constitution of Rhode Island, that no person shall "be deprived of life, liberty, or property, unless by the judgment of his peers, or the law of the land," says, "The exposition of these words, as they stand in Magna Charta, as well as in the American Constitution, has been, that they require 'due process of law,' and in this is necessarily implied and included the right to *answer and contest the charge*, and the consequent right to be discharged from it, unless it is proved."

He subsequently adds: "It follows, that a law which should preclude the accused from answering to and contesting the charge, *unless he should first give security* in the sum of \$200, with two sufficient sureties, to pay all fines and costs, and which should condemn him to fine and forfeiture unheard, if he failed to comply with this requisition, would deprive him of his liberty or property, not by the law of the land, but by an arbitrary and unconstitutional exertion of the legislative power."

The conditions imposed upon the right of defence by § 17 of our act are far more onerous and embarrassing than that condemned by the learned justice in this passage; and if he is right, it is impossible to sustain the section against this objection.

It is equally clear that it conflicts with another clause of the constitution. Section 6, Art. 1, declares that no person "shall be compelled to be a witness against himself." Section 17 says to the defendant, you shall not go into your defence unless you will not only swear to your innocence, but make yourself a witness, and testify to all the circumstances of the case. This, for all substantial purposes, is compelling him to be a witness against himself. It is doing precisely that against which it was the object of the constitution to protect him, viz., searching his conscience under *the constraint of an oath*. There is no difference between compelling a man to be sworn, and assuming his guilt if he refuses; because his refusal has precisely the same effect as if he was sworn and testified to his own guilt—it *convicts him*. Indeed, the provision is virtually compulsory, as there could scarcely be a more effectual way of compelling a man to be sworn than to say that, unless you con-

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sent, you shall be convicted and punished as a criminal. The section, therefore, is, in this aspect, in my judgment, a plain violation of the constitution.

But a point of still greater interest arises upon the first branch of § 17, which provides that, "upon the trial of any complaint, commenced under any provision of this act, proof of the sale of liquor shall be sufficient to sustain an averment of an unlawful sale, and proof of delivery shall be *prima facie* evidence of sale."

There are two classes of cases upon which this provision operates with great severity. Although the act does not prohibit the keeping of spirituous liquor, or the giving it away, in a private dwelling, yet, by the clause, the mere delivery is made *prima facie* evidence of an unlawful sale, *without exception as to place*. No one, therefore, can, in his own house, give a glass of wine to a friend without thereby affording *prima facie* evidence to convict him of misdemeanor. Other portions of the act purport to respect the sanctity of the private domicil of the citizen; but its innermost recesses are penetrated by this provision, and acts of mere kindness or courtesy are converted into proofs of guilt.

But the operation of the section upon another class is equally onerous. I mean the class of licensed venders. Sections 2 and 3 expressly authorize certain persons to sell, who are required to give ample security not to violate any provision of the act; and yet, by force of the clause in question, every sale they make affords *prima facie* evidence to convict them. The act presumes against the innocence of its own selected agent, and will not permit this presumption to be rebutted, until such agent consents to make himself a witness in the case.

This provision raises the vital question as to the value of that clause in the constitution which secures to every man charged with crime a trial by "due process of law." The most important guarantees of individual right which our constitution affords are concentrated in this single phrase.

As we have already seen, the expression "due process of law," first appeared in a statute of Edward III, as a paraphrase

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of the words “by the law of the land,” *per legem terræ*, in Magna Charta; and from that day to this both forms of expression have been held to refer to the *common law*, as distinguished from statutory enactment.

Sir MATTHEW HALE says, “The common law is sometimes called, by way of eminence, *lex terræ*, as in the statute of Magna Charta, (*chap. 29.*) where certainly the common law is principally intended by those words, *aut per legem terræ*, as appears by the exposition thereof in several subsequent statutes, and particularly in the statute of 28 Edw. III, *chap. 3*, which is but an exposition and explanation of that statute.” (1 *Hale's Hist. Com. Law*, 128.)

Lord COKE, also, in his Commentary upon Magna Charta, puts the same construction upon the words. (2 *Inst.* 45, 50.)

The courts in this country have held the same. Chief Justice RUFFIN, speaking of this clause in the constitution of North Carolina, in the case of *Hoke agt. Henderson*, (4 *Dev.* 1,) says, that “such legislative acts as profess in themselves directly to punish persons, or to deprive the citizen of his property without trial before the judicial tribunals, and a decision upon the matter of right, as determined by the laws under which it vested, according to the course, mode and usages of the common law, as derived from our forefathers, are not effectually laws of the land for these purposes.”

To the same effect is the language of Judge BRONSON, in *Taylor agt. Poster*, (4 *Hill*, 140,) where, in speaking of § 1, Art. 7, of the constitution of 1821, he says, “The meaning of the section, then, seems to be, that no member of the state shall be disfranchised, or deprived of any of his rights or privileges, unless the matter shall be adjudged against him upon trial had according to the course of the common law.”

If this interpretation is correct, and it is sustained as well by history as by judicial authority, the clause in question was intended to secure to every citizen the benefit of those rules of the COMMON LAW, by which judicial trials are regulated; and to place them beyond the reach of legislative submission. They are, indeed, virtually incorporated into the constitution itself,

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and made thereby a part of the paramount law. Trials, therefore, at least such as are criminal, are to be regulated and conducted, in their essential features, not by statutes, but by the common law. This the constitution guarantees. Precisely how far the legislature may go in changing the modes and forms of judicial proceeding, I shall not attempt to define; but I have no hesitation in saying that they cannot subvert the fundamental rule of justice, which holds that every man shall be presumed innocent until he is proved guilty. This rule will be found specifically incorporated into many of our state constitutions, and is one of those rules which, in our constitution, is compressed into the brief but significant phrase, "due process of law."

Can section seventeen be reconciled with this rule? It provides that upon every prosecution under the act, proof of a sale of liquor shall sustain an averment of an unlawful sale, and proof of delivery shall be *prima facie* evidence of a sale. It is plain that, at common law, the legal presumption would be directly the reverse of that declared by the act. Where the common law would presume innocence this act presumes guilt. Either the guaranty of a judicial trial according to the course of the *common law* is a nullity, or the provision is void.

But I am prepared to go further, and to hold that *all* those fundamental rules of evidence which, in England and in this country, have been generally deemed essential to the due administration of justice, and which have been acted upon and enforced by every court of common law for centuries, are placed by the constitution beyond the reach of legislation. They are but the rules which reason applies to the investigation of truth, and are, of course, in their nature unchangeable. If it does not follow that to determine what they are, as applicable to judicial proceedings, is a judicial and not a legislative power, still they must necessarily be included in the phrase, "due process of law." If this be not the true interpretation of the constitution—if the legislature, in addition to declaring what acts and what *intentions* shall be criminal, can also dictate to courts and juries the *evidence*, and change the legal presumptions upon

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which they shall convict or acquit, there is no barrier to legislative despotism; and the separation of the legislative and judicial departments of the government, the guaranty of trial by jury, and of a trial according to the course of the common law, have all failed to afford any substantial security to individual rights.

I am unable, therefore, to resist the conviction that in both branches of § 17 the legislature has transcended the just limits of its power, and trespassed upon the constitutional province of the judiciary.

The judgment of the supreme court should be affirmed.

DENIO, Ch. J., A. S. JOHNSON and HUBBARD, J. J., delivered opinions deciding this law to be unconstitutional.

MITCHELL, WRIGHT and T. A. JOHNSON, J. J., delivered dissenting opinions.

NOTE.—In consequence of the very large space which *all* the opinions of the court would occupy, it will scarcely be expected that they will appear in this work. Besides, they have been, or will be very generally published in other forms. The first two prevailing opinions which the reporter could get, were immediately prepared, and are here published.

SUPREME COURT.

JAMES STEPHENSON agt. LUCINDA CLARK, Administratrix, &c.,
of JESSE CLARK, deceased.

There is no reason for saying, that a defendant, administratrix, unreasonably resisted or neglected the payment of a demand against the deceased's estate, where it appeared that she had good reason to suppose there was a valid defence to the claim, in whole or a material part of it; and that probably the defence interposed would have been successful if, at the trial, she could have procured her witness. Under such circumstances it was her duty to attempt a defence.

And in order to charge an estate with costs, on the ground of a refusal to refer a claim, it must appear affirmatively that there was a *refusal* by the legal representative to refer.

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Where the claimant said to the administratrix, on presenting his account, "I don't want any trouble about it, as we have always been good friends, and I am willing to have the account referred to some disinterested persons," and she replied, "I hope there will be no trouble about it; and I will see George [her son] about it;" and on the same day a summons upon the claim was put into the sheriff's hands, but not served until some fourteen days afterwards.
Held, that it was natural that the administratrix should understand that a general leaving out of the matter in the nature of an arbitration was intended, instead of a strict legal reference under the statute; besides, there was, in fact, no *refusal* to refer; and she was entitled to a reasonable time after the demand, to consider what to do, and to take counsel if necessary.

Seneca Special Term, April, 1855.

MOTION on behalf of plaintiff for costs against the estate of the intestate.

A. T. KNOX, *for plaintiff.*

W. BURTON, *for defendant.*

WELLES, Justice. The action was brought to recover the balance claimed to be due on a book account consisting of a variety of items. It was referred for trial to a sole referee, who reported due from the defendant to the plaintiff \$67.97.

It appeared that on the 22d day of December, 1852, the plaintiff handed the defendant a copy of the items of the account, saying to her at the same time, "I have an account against you for lumber, that Mr. Clark had, and I would like to have it settled, and I have spoken to your son George several times about having it settled; and I do not want any trouble about it, as we have always been good friends, and I am willing to have the account referred to some disinterested persons;" to which the defendant replied, taking the copy account, "I hope there will be no trouble about it; and I will see George about it." The summons by which the action was commenced, was put into the hands of the sheriff the same day, to be served on the defendant.

The plaintiff states in his affidavit, that the reason the summons was put into the hands of the sheriff on that day was to save the statute of limitations, which he erroneously supposed

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would, in a day or two, run against the claim. The summons was served on the defendant the 6th day of January, 1853. It appeared that neither the defendant nor her son George had offered to refer the claim.

The plaintiff is not entitled to recover costs, unless it be made to appear, that the demand on which the action was founded was presented within the time named in the notice, which the law authorizes executors and administrators to give to creditors at least six months after granting letters testamentary or of administration, and that its payment was unreasonably resisted or neglected; or that the defendant refused to refer the same, according to statute. (2 R. S. pp. 88, 89, 90, 1 ed., §§ 39-46, *inclusive*; 4th ed. pp. 274, 275.)

There is no reason for saying the payment of the demand was unreasonably resisted or neglected. The opposing affidavit shows that the defendant had good reason to suppose there was a valid defence to the action in whole or a material part; and that probably the defence interposed would have been successful, if at the trial she could have procured her witness. Under such circumstances, it was her duty to attempt a defence.

Nor do I think it can be said she refused to refer according to the statute. In order to put an executor or administrator in default for not referring a claim, so as to charge the estate with costs, it must appear that there was a *refusal* to refer. Here was no refusal, nor anything like it. The proposal of the plaintiff was not calculated to apprise the defendant that a reference under the statute was desired. It would be natural for her to understand that a general leaving out of the matter in the nature of an arbitration was intended, instead of a strict legal reference pursuant to the statute. Besides, she did not refuse to comply with such offer as was made, but merely took the account and remarked, she hoped there would be no trouble about it, and promised to see her son on the subject.

The summons was placed in the sheriff's hands the same day, and although it was not served until some fourteen days after, yet if the defendant had entered into a stipulation the next day after the account was delivered to her, to refer the matter, it

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might have been claimed that it was a reference of the action already commenced.

She was entitled to a reasonable time, after the demand was made, to consider what to do, and to take counsel if necessary.

I think the motion should be denied, with \$7 costs.

SUPREME COURT.

SOLOMON ROOSA agt. PETER J. SNYDER, survivor, &c.

The judge at the circuit is not authorized to direct that the motion for a new trial, upon exceptions, be heard, in the first instance, at a general term, and at the same time, allow the prevailing party to proceed to *judgment* upon the decision at the circuit.

If he will order the case to be heard at a general term, in the first instance, he must also direct the *entering of judgment to be suspended until such hearing*.

It seems, that an entry by the clerk in the minutes, that "the court directed that the exceptions be heard, in the first instance, at a general term," should be construed to operate as a stay.

Albany Special Term, Aug., 1855.

MOTION to set aside judgment, &c., for irregularity.

The action was tried at the Ulster circuit in April, 1855. Upon the trial, the plaintiff was nonsuited. The judge who presided at the trial made an order that the plaintiff have sixty days to make a case, or bill of exceptions; that the defendant have the same time to make and serve amendments thereto; and that the hearing be had, in the first instance, at the general term. The order was made in open court, and entered by the clerk in the minutes of the trial. Within the time allowed by the order, the plaintiff's attorneys prepared and served exceptions, and the defendants' attorney proposed amendments. Notice of settlement was served for the 13th of August; on

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which day the papers were submitted to the judge. On the same day, the defendant's attorney perfected judgment against the plaintiff for the costs of the action. Upon these facts, the plaintiff's attorneys moved to set aside the judgment and all subsequent proceedings.

E. COOKE, *for plaintiff.*

E. WHITAKER, *for defendant.*

HARRIS, Justice. The 265th section of the Code provides, that where exceptions have been taken upon a trial, the judge trying the cause may, at the trial, direct that the motion for a new trial, upon such exceptions, be heard in the first instance, at a general term, and that the judgment in the meantime be suspended. It is further provided, that when such an order has been made, the motion for a new trial upon the exceptions can only be made, and judgment, in case the motion is denied, can only be rendered at a general term. The order transferring the case to the general term, and suspending judgment until the hearing, is but a single direction. The judge at the circuit is not authorized to direct that the application be heard at the general term, and at the same time allow the prevailing party to proceed to judgment upon the decision at the circuit. If he will order the case to be heard at a general term, in the first instance, he must also direct the entering of judgment to be suspended.

The order entered in this case was not such as the judge at the circuit was authorized to make. Having directed that the hearing upon the exceptions should be had at a general term, he should also have directed that the entering of judgment be suspended until such hearing. This was probably intended, but the clerk, in entering the direction in his minutes, has merely stated that the court directed that the exceptions be heard, in the first instance, at a general term. I think even this direction should be construed to operate as a stay of proceedings upon the decision, the review of which had been thus ordered to be had before another tribunal. The entry made by

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the clerk, as it often is in such cases, was informal. But it cannot be doubted, I think, that the judge intended to make the order authorized by law, and that the parties understood, not only that the application for a new trial should be made at a general term, but that in the meantime the entering of judgment should be suspended.

The motion to set aside the judgment and subsequent proceedings must be granted—but perhaps, under the circumstances, the question being somewhat novel, the defendant should not be charged with the costs of the motion.

SUPREME COURT.

JOHN DAVIS agt. Wm. C. CARPENTER.

The committee of the person and estate of an habitual drunkard may bring actions on promissory notes he received as such committee, *in his own name*, without describing himself as committee.

In an action brought on three promissory notes, payable to a former holder or bearer, where the plaintiff alleged in his complaint that he was the owner and holder of the notes, and the defendant, in his answer, denied such allegation, and set up the defence of usury to two of the notes,

Held, that the defendant, on the trial, without amending his answer, might prove that the plaintiff had no personal interest in the notes, but held them, and sued on them, as the committee of the person and estate of the payee and former holder, who was an habitual drunkard, so as to authorize the introduction of the declarations of such habitual drunkard, prior to his being declared such, to the effect that the notes were usurious and void.

Also *held*, that such matters were not pleadable, being merely evidence to establish the defence of usury.

Tompkins Circuit, Feb., 1856.

THIS action was tried at the Tompkins circuit, before Mr. Justice BALCOM, on the 9th day of February, 1856.

B. G. FERRIS, *for plaintiff.*

BRUIN & WILLIAMS, *for defendant.*

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BALCOM, Justice. This action is brought to recover the amount of three promissory notes. The plaintiff, in his complaint, alleges he is the owner and holder of the notes, which are payable to Alvah Davis or bearer.

The defendant, in his answer, denies the allegations in the complaint, and sets up the defence of usury to two of the notes. He now offers to prove that the plaintiff has no personal interest in the notes, but holds them as the committee of the person and estate of Alvah Davis, the payee named therein, who is an habitual drunkard. He desires to make this proof to authorize him to give evidence of the declarations of such payee, made prior to being declared such habitual drunkard, to the effect that two of the notes are usurious and void.

The plaintiff's counsel objects to the evidence that the plaintiff holds the notes as such committee, on the ground that no such defence is set up in the answer. The answer to this objection is, that such fact would constitute no defence to the action, and therefore it is not pleadable.

The committee has properly brought the action in his own name. (*Laws of 1845*, p. 91, § 2; § 113 of the *Code*; 8 *Barb.* 552; 14 *id.* 488.)

The objection is overruled, and the evidence is allowed, to enable the defendant to prove the admissions of Alvah Davis, who is the real party in interest on the part of the plaintiff.

After the evidence was given, a verdict was rendered for the defendant on two of the notes, and for the plaintiff on the other.

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SUPREME COURT.

CATHARINE M'INTOSH agt. THOMAS M'INTOSH.

An application for *divorce* on the ground of *adultery*, cannot be classified under § 179, sub. 1, of the Code, as an action for "an injury to the person or character." It stands upon a different footing, and contemplates a wholly different result.

An action for a *limited divorce*, on the ground of *cruel and inhuman treatment*, clearly comes within the definition of injuries to the person, mentioned in § 179.

It would therefore be a very improper union of causes of action, to allow these two distinct and separate grounds of relief, founded on utterly dissimilar transactions, requiring different lines of testimony, and a totally different array of evidence, both in the attack and defence, and leading to dissimilar judgments, to be united in the same complaint.

Besides, if the plaintiff is right on the first ground of complaint, a single trial would dispose of the whole controversy, and give her the largest relief the law is capable of affording.

Oneida Special Term, March, 1856.

THE plaintiff, by her next friend, filed her complaint in this case against her husband, the defendant, praying relief against him; first, for an absolute divorce on the ground of adultery; and secondly, for a limited divorce, on the ground of cruel and inhuman treatment.

The defendant interposed a demurrer to the complaint, on the ground that several causes of action had been improperly united.

M. H. THROOP, *for defendant.*

J. G. CRAMER, *for plaintiff.*

BACON, Justice. It is not claimed on the part of the plaintiff that the causes of action, which are united in the complaint, come within the scope of the first subdivision of § 167 of the Code, which provides for such union of causes when they

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"arise out of the same transaction, or transactions, connected with the same subject of action."

But it is insisted that the case falls within the terms and intent of the third subdivision of the section which authorizes such union when the cause of action arises out of "injuries, with or without force, to person and property, or either."

The second cause of action, which asks relief on the ground of cruel treatment, undoubtedly comes within the definition of injuries to the person; and the question is, whether the relief demanded on the alleged ground of the adultery of the defendant falls within the same category?

It is not to be doubted, I think, that when the 167th section was prepared, the subject of actions at law was within the contemplation of the authors of the Code, and that matters of equitable cognizance were not intended to be provided for by this section, and its various subdivisions.

The subsequent amendment has extended the scope of the section, but it has not, as I conceive, enlarged the classification of actions which come within the definition of those which are founded on injuries to the person.

Before the Code, it would not have been deemed that an action for a divorce on the ground of adultery would be treated or termed an action for an injury to the person.

It is founded on an alleged breach of the marriage contract, and seeks an absolution from its engagements by the aggrieved party, and asks no pecuniary compensation by way of damages, either of a primitive or compensatory nature.

It is remarked by VAN SANTVOORD, (*Pleadings*, 2d ed. p. 199, &c.,) that there is a large class of actions in which relief was formerly administered on the equity side of the court, which do not strictly belong to either of these subdivisions, and for the joinder of which the Code lays down no rule, except that prescribed in the first subdivision, and among these he names an action for divorce; and the same remark, in substance, is made by WILLARD, J., in *Durkee agt. Saratoga and Washington Railroad Company*, (4 *How.* 226.)

I should have had no doubt that the claim for relief, grounded

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on the allegation of adultery, could not be classed with injuries to the person, but for the decision of Justice PARKER, in *Delamater agt. Russell*, (4 How. 234,) where he holds, that an action for criminal conversation with the plaintiff's wife comes within the 179th section, which provides for the arrest of a party defendant, where the action is for "an injury to the person or character." He vindicates it on the ground that the action is brought for depriving the plaintiff of the comfort, society and aid of his wife, and is therefore an invasion of his personal rights. It is possible this construction may be upheld, viewing the action in this light, and as brought against the wrong-doer, and seeking pecuniary compensation for the outrage. This decision has been followed in the sixth district, and applied to an action of seduction, although with some hesitation. (3 *Code Rep.* 9.)

I should be reluctant to carry the doctrine any further than these cases have gone; and as an application for a divorce on the ground of adultery stands upon a different footing, and contemplates a wholly different result, it should not be classified under this subdivision of the Code. It is not technically, nor within the normal or legal sense of the terms an action for an injury to the person.

It was long ago decided, in the old court of chancery, that charges of adultery, and of cruel usage, being distinct and independent, and leading to distinct issues and decrees, could not be joined in the same bill. (*Johnson agt. Johnson*, 6 John. Ch. R. 163.) In deciding this case, Chancellor KENT remarks forcibly upon the inconsistency and incongruity of the two charges, both as to the mode of proceeding and the remedy. The charge of adultery overpowers and destroys the effect of the other charge, and the one remedy merges in the other. There is no reason for uniting the two charges, unless it be to favor the plaintiff as to costs, by allowing her to have one charge in her bill to resort to when the other fails. He adds: "The charge of adultery is too grave to be made without very satisfactory grounds. It strikes at the very existence of the

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marriage tie ; and neither of the parties ought to be encouraged to make it by any special indulgence of the court." The same point was held in *Smith agt. Smith*, (4 Paige, 92,) by Chancellor WALWORTH, who goes through nearly the same process of reasoning, without having been apparently aware that Chancellor KENT had anticipated him, and already decided the case.

It would, therefore, in my judgment, be a very improper union of causes of action, to allow these two distinct and separate grounds of relief, founded on utterly dissimilar transactions, requiring different lines of testimony, and a totally different array of evidence, both in the attack and defence, and leading to dissimilar judgments, to be united in the same complaint. If the plaintiff succeeds on the first ground, she is entitled to have a judgment that the marriage tie be dissolved ; and she is wholly released from its obligations ; and the other issue is totally irrelevant and immaterial.

But one distinct and specific issue should, if possible, be presented to the jury ; and neither they nor the court should be embarrassed by two trials proceeding concurrently in the same cause, when if the party is right in the alleged ground of complaint first presented, a single trial will dispose of the whole controversy, override all minor questions and issues, and give her the largest relief which the law is capable of affording.

There must be judgment for the defendant on the demurrer, with leave to the plaintiff to amend on payment of costs.

NEW-YORK PRACTICE REPORTS.

Fuller agt. The Webster Fire Insurance Company



SUPREME COURT.

WILLIAM J. A. FULLER agt. THE WEBSTER FIRE INSURANCE COMPANY.

The court will direct an amendment of the pleadings by substituting a party as defendant, when it appears, at any stage of the proceedings, that such amendment will further the ends of justice.

New-York Special Term, March, 1856.

THIS was a motion to refer the cause, on the ground that the trial would require the examination of a long account.

It appeared, in opposition to the motion, that a receiver had been appointed of all the effects of the company, upon the application of a stockholder, and that the company had been enjoined perpetually from exercising any of its corporate functions.

An answer had been served by the receiver in the name of the corporation in which the facts aforesaid had been pleaded.

I. T. WILLIAMS, *for plaintiff.*

PETER Y. CUTLER, *for defendants.*

DAVIES, Justice. This is an application for a reference. The defendants object, that the corporation has been dissolved, and that consequently this action cannot be maintained, and is, in fact, not pending.

This suit is brought by the plaintiff as assignee of Blaisdell, former secretary of the company, to recover a large sum due for services rendered and moneys expended by Blaisdell to and for the company.

The suit was commenced on the 14th of November, 1855.

The answer sets up that the company was dissolved on the 27th of September, 1855, and a receiver appointed. It appears, from the proceedings furnished me on this application

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for the appointment of a receiver, that it was made under §§ 47, 48 and 49 of chapter 8, article 2d, title 4, part 3d, of the Revised Statutes.

In the case of *Ver Plank* agt. *The Mercantile Insurance Company of New-York*, (2 Paige, 452,) Chancellor WALWORTH held a similar proceeding to be, "in effect, a final order in the cause; and, unless altered or revoked, operates as a virtual dissolution of the corporation."

The suit, therefore, cannot succeed against the present defendants. It is apparent to me, that this suit has been instituted in good faith, and that it is, in fact, defended by the receiver, who represents the defunct corporation.

The provision of § 173 of the Code, and the powers conferred by it on the court, may, with great propriety, be invoked in this case. I deem it, therefore, in furtherance of justice to make an order in this case, substituting the receiver of the defendants as the party defendant in this cause, and the answer therein do stand as his answer; and that the pleadings be amended accordingly.

And further, that the cause be referred to William Emmerson, Esq., as referee, to report thereon with all convenient speed.

No costs to either party to be allowed on this motion.

SUPERIOR COURT.

JOHN LIDDLE agt. JOHN M. THATCHER.

On the removal of a cause from the state court into the circuit court of the United States, where there is an injunction, the order for removal may provide that it (the order) shall not operate of itself, to *dissolve* the injunction. Although there is no provision in the statute for *continuing* the injunction on such removal, as there is in cases of special bail and attachment, yet, the cause may be *remanded* to the state court; and whether the removal carries with it the injunction in full force or not, it is important that, in case the cause is remanded, it should come back in the same situation as when it left.

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Special Term, March, 1856.

REMOVAL of cause to circuit court of the United States.

GEORGE C. GODDARD, *for plaintiff.*

CLARENCE A. SEWARD, *for defendant.*

HOFFMAN, Justice. The defendant has presented his petition for a removal of this cause into the circuit court of the United States, and has brought himself fully within the provisions of the statute to entitle him to the order. The plaintiff, however, asks that it be made part of the order, that the injunction granted in the cause do remain until it shall be dissolved by this court, or by the circuit court of the United States.

The statute is peremptory, that when its requisitions are complied with, the cause is removed by its own force, and it is the duty of the state court to proceed no further. All subsequent proceedings in it are void, as being *coram non judice*. (*Gorden agt. Longret*, 16 *Peters'*, 97; *Kanouse agt. Martin*, 15 *Howard*, 198.) It would seem that any attempt to enforce the injunction would be unavailable.

Again: The statute provides for continuing the security of special bail, where special bail was originally requisite; and it also provides for the continuance of any attachment which has been issued in the state court, and that is to hold the goods in the same manner as it would have done, had the final judgment been rendered in the state court.

No provision is made for the continuance in force of any other preliminary or provisional remedy known in the state courts. Besides, the attachment is regarded in most states as the mode of commencing a suit.

To insert such a clause as is proposed, upon the hypothesis of the cause being properly removed, which is admitted to be the case here, would seem superfluous. But it may well be urged, that cases have been remanded from the circuit court; and in such instances it would seem anomalous that the process

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should have lost its effect in the interval, when the case was wrongly removed.

In *Ward agt. Arendondo*, (1 *Paine, C. C. R.* 410,) for example, the cause was remanded—and in other instances. It must be that the cause comes back in the same position as when it was transferred. The party's rights would otherwise be greatly prejudiced.

There is another consideration. It may be that the cause, when removed, carries with it the injunction in full force. That the circuit court would recognize it as in existence. I speak of course with great hesitation upon this point. But the theory is, that the case goes to the circuit court in its actual position.

If it is urged that there is no provision for enforcing the injunction, the answer may be, that there is no provision for enforcing a state attachment. Yet, as the statute preserves it, the court must have some mode of making that preservation available.

I am inclined, therefore, to think that it may be made part of the order, that it shall not operate of itself to dissolve the injunction.

In case, then, the cause is remanded, the defendant would be liable for a violation in the interim. He is subject to that risk. In case the circuit court can hold the injunction transmitted with the action, the conclusion that the state court deemed it *ipso facto* dissolved, will be excluded. The defendant cannot be prejudiced by the clause.

Order accordingly.

Roosa agt. The Saugerties & Woodstock Turnpike Road Co.

SUPREME COURT.

SOLOMON ROOSA agt. THE SAUGERTIES & WOODSTOCK TURN-PIKE ROAD COMPANY.

The report of a referee (whose integrity was not questioned) was set aside, as against public policy, on these facts:—

Nearly two years before finally deciding the case, the referee received his fees from the defendants, assuring them that the decision was to be in their favor; afterwards, without informing the other party of what had occurred, he first promised him that he would suspend a decision until the determination by the court of another cause, (supposed to involve the same question,) and after such decision repeatedly assured him, and his attorneys, that the report should be made in his favor; and then again, as late as four or five days before the report was actually made, promised both parties that he would re-examine the case, which he did, and made a report in favor of the defendants.

It is important that the conduct of those to whom the pure and impartial administration of the law is entrusted, should be such as to furnish to those who litigate no just grounds of suspicion. (*See Dorlon agt. Lewis, 9 How. Pr.R. 1.*)

Albany Special Term, July, 1855.

MOTION to set aside report of referee.

The action was brought to recover a balance of account alleged to be due from the defendants to the plaintiff. It was tried before a referee. The case was finally submitted to the referee for decision on the 18th of May, 1853. On the 13th of July in the same year, the referee informed the agent of the defendants that he had made up his mind to decide the case in favor of the defendants, and was then paid \$25 for his fees as referee, for which he gave a receipt.

On the 11th of June, 1855, the referee delivered to the defendants' attorney his report, to the effect that the plaintiff should be nonsuited. The grounds of the motion to set aside the report sufficiently appear in the opinion of the court.

E. COOKE, for plaintiff.

HENRY HOGEBOOM, for defendants.

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HARRIS, Justice. Although the referee had announced to the agent of the defendants his intention to decide the case against the plaintiff, and had received his fees, which he was only entitled to receive from the prevailing party, and from him only upon completing the discharge of his duty as referee; yet, according to the statement of the referee himself, he subsequently promised the plaintiff that he would not decide the case until a decision should be made by the general term of the supreme court in another cause which was supposed to involve similar questions. It is evident, that when he made this promise he did not regard himself as having finally disposed of the case.

The referee further states, that about November, 1854, he was informed by the plaintiff that the decision of the supreme court, in the other case, had been made in his favor, and he then told the plaintiff that, if such was the case, he would decide this case in his favor also, and promised to make his report at an early day.

Mr. Bruyn, one of the plaintiff's attorneys, states, that some time in the fall of 1854, the referee volunteered to say to him, without being spoken to or inquired of on the subject, that he had made up his mind to give a report in this case in favor of the plaintiff, and had promised him that he would draw up a report for him.

Mr. Cooke, the other attorney for the plaintiff, states, that during the session of the circuit court, held at Kingston in November, 1854, the referee came to him, and voluntarily told him that he had examined the case, and had concluded to decide it in favor of the plaintiff, and that he would hand to him, or the plaintiff, the report before the opening of the court the next morning, adding, that he then had it partly made out, and would finish it that evening.

The referee does not deny having made these statements, but he alleges that he did so, relying upon what the plaintiff had told him in relation to the decision of the supreme court; that it was his intention, before making his report, to examine the decision in the other case, and, upon such examination, he found that, although the court had granted a new trial to the

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plaintiff, it had not pronounced upon the validity of the plaintiff's claim.

The plaintiff further states, in his affidavit, that about the first of June, 1855, he again called the attention of the referee to the subject, and was then told that the agent of the defendants had been *at him* about the report, and that he would decide it soon. The referee states, upon this point, that some four or five days before he made the report, both the plaintiff and the defendants' agent called on him, and inquired about the report; that he stated to them why it had not been made before, and then again promised to *re-examine* and decide the case that week; that he did accordingly re-examine the case, and on the Monday following made his report, and delivered it to the defendants' attorney.

Upon a state of facts like this, I feel constrained to set aside the report. In doing so, I am gratified to be able to say that the grounds upon which I put the decision do not, in any respect compromise the integrity of the referee. There is nothing in the case, even as it is made by the papers in support of the motion, which would justify the conclusion that the referee had, in the least degree, intended to swerve from an honest discharge of duty. But, as in the case of *Dorlon agt. Lewis*, (9 How. 1,) where the referee was a man whose integrity was above all suspicion, the report was set aside upon considerations of public policy, so here, while I see nothing in the facts which leads one to doubt that the referee intended, from the first, to do what he believed to be right in the case, yet the kindness of his temper and the simplicity of purpose, by which he has been actuated, have led him to a course of indecision and vacillation tending very greatly to impair the respect to which his decision would otherwise have been entitled. The fact, that nearly two years before finally deciding the case, he should have received his fees from one of the parties, assuring him that the decision was to be in his favor, and that afterwards, without informing the other party of what had occurred, he should first promise him that he would suspend a decision until the determination of another cause, and then should assure him, and his attorneys,

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again and again, that the report should be made in his favor; and then, again, as late as four or five days before the report was actually made, that the referee should promise both parties, as well the party to whom he had two years before declared that his mind was made up, and from whom he had actually received his fees, as the party to whom, and to whose attorneys, he had repeatedly promised a report, that he would re-examine the case, is more than I am willing to sanction. Conceding that no injustice has been done—and whether there has or not, this is not the time to inquire—it is far better that the parties should be subjected to the expense of a re-trial before another referee, than that such a precedent should be left to exert its influence in the decision of similar cases which may arise hereafter.

All agree that the administration of the law must be pure and impartial. But it is scarcely less important that the conduct of those to whom its administration is entrusted should be such as to furnish to those who litigate no just grounds of suspicion.

I think the motion to set aside the report should be granted, but without costs.

SUPREME COURT.

LAWRENCE MERSEREAU agt. JOSEPH W. RYERSS, Administrator, &c., of JOHN P. RYERSS, deceased.

In actions prosecuted or defended by an executor or administrator, a referee, to whom the whole issue or cause is referred, has not the right to decide the question of *costs*, or the power to award costs against the executor or administrator personally, or against the estate he represents.

The power to grant costs against executors and administrators, in actions under the Code, rests with the court.

Whether, where an action against an administrator, is tried before a referee, it is indispensably necessary to present to the court his certificate of facts affect-

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ing the question of costs appearing upon the trial, on a motion for costs against such administrator—*quere?*

It seems, the better practice is to present the certificate of the referee on the motion for costs.

Facts, other than those appearing on the trial, are proper to be considered in determining whether costs shall be recovered against executors and administrators.

It seems, referees, in actions of an *equitable nature*, have the right, and it is their duty, to decide the questions of costs; because the costs in such actions are awarded or withheld upon the facts proved on the trial, and they rest in *discretion* of the court.

The right to costs against executors and administrators does not rest in the discretion of the court, but upon ascertained facts.

No costs, in actions prosecuted in the supreme court, can be included in the judgment against executors or administrators, without leave of the court.

A motion for an *extra allowance as costs*, under § 308 of the Code, in an action against an administrator, is premature, if made before the right to recover the *ordinary taxable costs* in the action has been determined.

It seems, the motions for the ordinary taxable costs in the action, and for an extra allowance under § 309, of the Code, may be made at the same time, and upon the same papers.

Tompkins Special Term, Jan., 1856.

THE plaintiff obtained a report in this action before a referee against the defendant, which stated there was due the plaintiff from John P. Ryerss, deceased, the sum of \$1,829.20, *besides costs*. There was no other allusion to the question of costs in the report; and the referee made no certificate showing that the defendant was liable, under the statute, to pay costs; and no application has been made to the court, for leave to enter judgment against the defendant for the ordinary taxable costs in the action.

It appears, from the affidavits presented to the court, that the plaintiff claimed judgment, in his summons and complaint, against the defendant as administrator of the goods, chattels and credits of John P. Ryerss, deceased, for the sum of \$3,662.82. Also, that the claim on which the action was brought had not been presented to the defendant or rejected by him; nor did the plaintiff offer to refer the same to referees prior to commencing this action. A motion is now made for an order that the plaintiff be entitled to recover an *extra allowance as*

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costs, under § 808 of the Code, on the ground that the action was difficult or extraordinary.

B. G. FERRIS, *for plaintiff.*

ROBERT CAMPBELL, *for defendant.*

BALCOM, Justice. The motion for *extra costs* in this action is based on the assumption, that the referee had the right, under § 272 of the amended Code, to award costs to the plaintiff; and that the report would authorize the plaintiff to enter judgment against the defendant for the *ordinary taxable* costs in the cause, without leave of the court. This position has undoubtedly been taken because this court has held, in actions of an *equitable nature*, where the whole issue or cause is referred, the referee has the right to decide the question of costs. (*Ludington* agt. *Taft*, 10 Barb. R. 448; *Graves* agt. *Leonard and others, assignees, &c.*, 4 How. Pr. R. 300.)

It is the duty of the referee to determine the question of costs in *equity cases*, because in such cases "costs may be allowed or not, in the discretion of the court." (§ 806 of the Code; *Hinds* agt. *Myers*, 4 How. Pr. R. 356; 3 Code Rep. 25.)

When *discretion* is to be exercised upon facts, appearing on a trial, the judge, or referee, who hears the evidence is the proper person to exercise such discretion.

The right to costs in actions against executors or administrators does not rest in the *discretion* of the court, but upon ascertained facts. (2 R. S. 90, § 41; § 317 of the Code.)

Prior to the enactment of the Code, such facts, in actions in the supreme court, were certified by the circuit judge before whom the trial was had. (2 R. S. 90, § 41.) But other facts, not within the knowledge of the circuit judge, might be considered by the court in directing the payment of costs in actions against executors and administrators. (*Gansevoort* agt. *Nelson, 6 Hill*, 393; 5 *Wendell*, 74.)

The statute is silent as to whether any certificate should be given when the action is tried before a referee; but I find certificates of referees have frequently been presented to the court

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on motions for costs in such actions. (6 *Hill*, 386; *Harvey* agt. *Skillman's Executor*, 22 *Wendell*, 571; *Nicholson* agt. *Showerman, administrator, &c.*, 6 *Wendell*, 554; 18 *id.* 453 & 454.)

If the referee's certificate is not absolutely necessary, upon which to found the motion for costs, the better practice would be to present it; for the court "may direct the costs to be levied of the property of the defendant, or of the deceased, as shall be just, having reference to the facts that appeared on the trial." (2 R. S. 90, § 41; § 317 of the Code.)

The referee is the most fit person to inform the court what facts appeared on the trial. When such facts are shown by affidavits, the court is often left in doubt as to what facts were established on the trial. If the referee's certificate is produced, there can be no controversy over what transpired on the trial. No certificate has been presented on this motion; nor will I hold that it is indispensably necessary, in all cases where actions against executors and administrators are tried before referees, to present the referee's certificate on a motion for costs against the defendants.

Before the Code, the statute authorizing the entry of judgments upon the reports of referees was as follows:—"If the report of the referees be confirmed by the court, judgment shall be entered thereon, in the same manner, and with the like effect, as upon the verdict of a jury." (2 R. S. 385, § 48.)

The order confirming the report was merely formal, and was entered of course without notice. (*Gra. Pr.*, 2d ed., 576; 2 *Hill*, 382.)

Section 272 of the Code provides, that "the report of the referees upon the whole issue stands as the decision of the court, and judgment may be entered thereon in the same manner as if the action had been tried by the court." No decision has been cited, nor am I aware of any, holding that an order for judgment, or confirming the referees' report, is necessary before entering the judgment on the report; and I think no such order is necessary, where the referee has the right to decide the question of costs, or where the right to costs is waived.

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If the right to costs against the executors and administrators depended solely upon the facts established on the trial, perhaps there would be little difficulty in finding authority under § 272 of the Code for the referee to decide the question of costs in such actions, as well as in actions of purely an equitable nature, where costs rest in the discretion of the court. But in the ordinary course of things, it must often happen that the referee will know very little about the main facts which touch the question of costs. The trial of the issue before him does not involve the inquiry, whether the executor or administrator has neglected to give notice to creditors, and so rendered it proper to award costs; nor whether the demand was presented to the executor or administrator for payment within the proper time; nor whether the executor refused to refer; nor as to many other facts affecting the right to costs. (*Potter* agt. *Etz and others, administrators*, 5 *Wendell*, 74; *Gansevoort* agt. *Nelson, 6 Hill*, 393.)

The practice under the Code, so far as my knowledge extends, has been against allowing referees to decide the right to costs against executors and administrators. (*Fort and wife* agt. *Gooding and others, executors*, 9 *Barb. R.* 888.)

My conclusion is, that in actions prosecuted or defended by an executor or administrator, a referee to whom the whole issue or cause is referred, has not the right to decide the question of costs, or the power to award costs against the executor or administrator personally, or against the estate he represents.

As no order has been made allowing the plaintiff to recover the ordinary taxable costs in the action, and as judgment for such costs cannot be entered without leave of the court, (*Knapp* agt. *Curtis et al. executors*, 6 *Hill*, 386; *Winne* agt. *Van Schaick, administrator, &c.*, 9 *Wendell*, 448,) the motion for an *extra* allowance as costs, under § 308 of the Code, is premature; and it becomes unnecessary to determine whether this is a difficult or extraordinary case within the meaning of the section, authorizing the court to allow the prevailing party *extra* costs.

The motion for an *extra* allowance as costs, under § 308 of

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the Code, is denied, with \$10 costs, but without prejudice to the plaintiff to make any other or further motion for costs, or for extra costs in the action.

SUPERIOR COURT.

CUNNINGHAM, Assignee, agt. M'GREGOR.

A general assignee, for the benefit of creditors, is a trustee of an *express trust*.

If he fails, in an action brought by him as such assignee, to recover a debt claimed to be owing from the defendant to his assignor, he cannot be charged personally for the costs, unless the court so specially orders, on the ground of his mismanagement or bad faith in such action. The costs are chargeable upon, and collectable out of the assigned estate.

The same rule of liability for costs applies to him that is applicable to executors or administrators.

It is not bad faith to prosecute a suit against the only responsible debtor of the assignor, without having funds to pay the costs of it, if unsuccessful, if the plaintiff believes, and has good reason to believe, that he is justly entitled to recover.

Special Term, Jan., 1856.

THE plaintiff is an assignee, under an assignment executed to him by *J. H. & J. D. Lyon*, of their property, in trust to pay their creditors. As such assignee, he brought this action to recover a balance alleged to be owing from the defendant to the assignors at the time of the assignment. The defendant obtained a report of a referee in his favor, and now moves for an order directing the costs to be paid by the plaintiff personally. The assignors assured the plaintiff that the balance sought to be recovered was due from the defendant. Defendant's affidavits state, (and this is not denied,) that the plaintiff had no funds with which he could pay the costs, if unsuccessful, when he brought the suit; and that at that time the plaintiff knew the assigned estate was insufficient to pay the costs of this ac-

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tion, and that he commenced the action without first asking the defendant to pay, or communicating with him on the subject.

HOFFMAN & PIRSSON, *for plaintiff.*

ROBERT H. SHANNON, *for defendant.*

BOSWORTH, Justice. The plaintiff is a trustee of an express trust. The Code puts such a trustee on the same footing as an executor or administrator, in respect to the costs of an action brought by or against him. Such a trustee necessarily prosecutes by virtue of his rights as trustee. (*Code*, §§ 111 and 113.) In such an action, if unsuccessful, the costs of the defendant can only be charged upon, or collected out of the estate he represents. (*Code*, § 317.)

The same rules must be applied to his case as are applied in actions necessarily brought by executors or administrators in their representative capacity. The Code allows of no discrimination between them. He cannot be charged personally, except for "mismanagement or bad faith in such action or defence." (*Code*, § 317.)

Being assured by the assignors that the balance claimed was justly due, and believing this assurance to be true, and therefore suing, he prosecuted in good faith. The fact that the defendant was, or might have been the only responsible person among the alleged debtors of the assignors, and that the estate might not be sufficient to pay the costs of this action, if successfully defended, is not sufficient to charge the defendant with bad faith in bringing the action. It was, in such a case, as much the duty of the plaintiff to attempt to collect this balance, if he believed the claim to be a just one, as it would have been if there had been other debtors who conceded their liability, and who were abundantly able to pay.

The fact, that no application was made to the defendant before suit brought, does not show bad faith --it may have been discourteous. All the affidavits taken together show that the plaintiff believed, when he brought the suit, and throughout its progress, that he was entitled to recover.

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There cannot be said to be bad faith in bringing, or prosecuting to a conclusion, any action in which the plaintiff honestly believes, and is advised by counsel, that he is entitled to recover. He cannot, therefore, be charged personally with the costs of this action. (*See 2d R. S. 615, §§ 16, 17; Graham's Prac. 737-739.*)

The motion is denied, but without costs.

SUPREME COURT

**MARQUIS C. GASPER & JOEL SEYMOUR agt. SAMUEL BENNETT
and others.**

A judgment-creditor may have his action against the judgment-debtor and his *assignees*, to set aside an assignment made by the judgment-debtor, to hinder and delay creditors, notwithstanding it appears that the assignment, although properly executed, had not been delivered, nor that the assignees had ever accepted the trust, and that the possession of the property had never been changed, but was still in the possession of the judgment-debtor.

Because, the plaintiff has no other way to set aside the assignment, or get it out of his way. With such an apparent incumbrance upon the property of the judgment-debtor, or claim upon his title, the plaintiff is not bound to go on and levy, and take the risk of litigation and his chance of impeaching the assignment in a suit at law.

By proceedings supplementary to execution under the Code, the plaintiff could not set aside this assignment. These proceedings are only adapted to reach the undisputed property of the judgment-debtor, and no contested title to property can be determined by them.

Steuben Special Term, March, 1856.

CREDITOR'S BILL.—The complaint in this action is in the form of an ordinary creditor's bill under the old practice, stating the recovery of a judgment since the Code, the issuing and return of execution *nulla bona*, and that Bennett, the judgment-debtor, had made an assignment to the other defendants, Bennett and M'Coy, to hinder and delay creditors, and asked that the assignment be set aside, and that defendants pay their

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judgment. The defendants demur to the complaint for insufficiency, and for that it does not state facts sufficient to constitute a cause of action.

ROBERT CAMPBELL, JR., *for plaintiffs.*

D. J. SUNDERLAND, *for defendants.*

E. DARWIN SMITH, Justice. As against the judgment-debtor alone, this action could not be sustained. Unless the complaint can be sustained with respect to him in connection with other parties, it would be but an action on a judgment forbidden by § 71 of the present Code. The complaint states the making of an assignment by the judgment-debtor to the other defendants, but does not allege that it had ever been delivered, or that the assignees had ever accepted the trust or interfered with the property; and the contrary thereof, so far as relates to the possession of the property, is expressly alleged in respect to the defendant M'Coy, and it states, also, that there had never been any actual and continued change of the possession of the property, and also states that the judgment-debtor had always remained in possession, and continued to control the same after the assignment.

The defendants' counsel contended that the assignment in question is not shown to have been any actual obstacle in the way of the plaintiffs in the collection of their judgment, and that the assignees are not, therefore, necessary or proper parties to the action. This, I think, is a mistake. The complaint refers to the assignment, a copy of which is annexed to it. The assignment appears to be a formal deed of transfer, sealed, signed and acknowledged, and its execution and delivery attested by a witness.

With such an apparent incumbrance upon the property of the judgment-debtor or claim upon his title, the plaintiffs were not bound to go on and levy upon the property, and take the risk of the litigation which might ensue. They might have been, and probably would have been, perfectly safe in doing so; but they were not bound to take that risk. They had a right to come into

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this court and ask to have the assignment set aside, and for that purpose the defendants, David J. Bennett and M'Coy, were necessary parties.

It is but an ordinary exercise of the equitable powers of this court to set aside fraudulent conveyances, and remove obstacles interposed by the devices or frauds of debtors to the free collection of debts by the common course of proceedings for that purpose. (*5 Paige*, 493; *2 Barb.* 237.)

If the assignment in this case has, in fact, never been delivered and accepted, and the assignees claim nothing under it, and do not intend to set it up as a valid conveyance, they have only so to answer and let it be set aside, and they cannot be injured by the suit or by being made parties to it. But being named as trustees in such an assignment, and entitled to set it up and claim under it, the plaintiffs had a right to call upon them by suit or action in court, to disclaim all title under it, or take the burden of accepting the trusts conferred by it—or of claiming to do so. The plaintiffs had no other way to set aside the assignment, or to get it out of their way in the collection of their judgment, unless they were willing to levy on the property assigned, and take their chance of impeaching the assignment in a suit at law. By proceedings supplementary to execution under chapter 2d, title 9th, of the Code, the plaintiffs could not have set aside this assignment. These proceedings are only adapted to reach the undisputed property of the judgment-debtor, and no contested title to property can be determined by them. (*Hayner agt. Fowler*, 16 *Barb.* 300; *Seymour agt. Wilson*, *id.* 294; *Goodyear agt. Betts*, 7 *How.* 188.)

Demurrer overruled, with leave to answer on payment of costs.

Davidson agt. Remington.

SUPREME COURT.

JOHN M. B. DAVIDSON agt. JOHN W. REMINGTON.

When a defendant has, against the plaintiff, a *cause of action*, (on contract,) upon which he might maintain a suit, it is a "*counter-claim*." In other words, a *cross-demand*.

But a counter-claim must exist *against the plaintiff*, as well as in favor of the defendant. Any other cause of action would not be a *cross-demand*.

Where the defendant alleges matter, which, if true, shows that the plaintiff never had a cause of action against him to the amount claimed in the complaint—such as the payment of a large portion of the promissory note, while in the hands of the payee: such matter does not constitute a counter-claim, and requires no reply. The defendant must *prove* his payments, therefore, where no reply is put in.

Albany Special Term, April, 1855.

MOTION to set aside judgment, &c.

The action was brought upon a note made by the defendant, payable to the order of one Emerson, for \$181.89.

The defendant, in his answer, admitted the execution of the note, and stated that, while Emerson was the holder of the note, he became indebted to the defendant, to the amount of \$98.12, for work, labor, &c.; and it was agreed between him and the defendant, that such indebtedness should be applied upon the note. The defendant claimed that, to this extent, the note was paid. No reply was put in by the plaintiff. The issue was noticed for trial at the Albany circuit in March, 1855; and when the cause was reached upon the calendar, the plaintiff took judgment for the whole amount of the note and interest, the defendant not appearing. Judgment was perfected, and execution issued.

The defendant moved to set aside the proceedings, on the ground that, there having been no reply served to the answer, the claim set up by the defendant against the note was admitted, and judgment should only have been taken for the balance.

GILBERT L. WILSON, *for plaintiff.*

D. L. BOARDMAN, *for defendant.*

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HARRIS, Justice. The question which this motion presents is, whether the matter set up by the defendant in his answer is a *counter-claim*, within the meaning of the term, as it is used in the 150th section of the Code. If it is, the plaintiff, by omitting to reply to it, as authorized by the 153d section of the Code, admitted the facts alleged, and was irregular in taking judgment for the whole amount of the note. If, on the contrary, the answer does not amount to a *counter-claim*, the plaintiff was not authorized to reply to it, and the facts alleged were put at issue by the operation of the 168th section of the Code.

The term "counter-claim" being new to the law, as well as the dictionary, judges have sometimes exercised themselves with the duty of framing a definition. The term itself has always seemed to me simple and significant, and its meaning obvious. I understand that when the defendant has, against the plaintiff, a cause of action upon which he might have maintained a suit, such cause of action is a *counter-claim*. The parties then have *cross-demands*. When such a cross-demand is interposed by the defendant, there are, in effect, two causes of action before the court for trial in the same suit. Both parties are, in some sense, plaintiffs, and both defendants. The answer, containing the cross-demand, called a counter-claim, is, in pleading, treated like a complaint by the defendant against the plaintiff, and the reply to such an answer like the answer to a complaint. Each party claims affirmative relief against the other.

The plaintiff asks for judgment against the defendant for the cause of action stated in the complaint, and the defendant asks for judgment against the plaintiff for the cause of action stated in the counter-claim. If both causes of action are established, the one is allowed to cancel the other, and judgment is only rendered against one or the other of the parties to the extent that one demand, as established by the judgment of the court, exceeds the other.

From this analysis of a *counter-claim*, it follows, that it must exist against the plaintiff as well as in favor of the defendant.

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Any other cause of action would not be a *cross-demand*. Hence the Code, in defining a *counter-claim*, commences by declaring that it must be a claim "existing in favor of a defendant and against a plaintiff."

From this examination of the elements which constitute a counter-claim, it is manifest, I think, that the matter stated by the defendant in his answer did not amount to such a pleading. When a defendant sets up a counter-claim, in pleading, he assumes that the plaintiff has a cause of action against him, and proposes to meet it by establishing another cause of action against the plaintiff. But here the defendant says, in effect, by his answer, that the plaintiff, to the extent of \$98.12, never had a cause of action against him. He alleges that when the plaintiff obtained the note against him, which constitutes the only cause of action, he acquired a right of action, not for the amount of the note, but for the difference only between that amount and the sum stated in the answer—that, with the exception of this difference, the note had been paid.

The defendant does not pretend to have a *cross-demand* against the plaintiff. He merely alleges matter which, if true, shows that the plaintiff never had a cause of action against him to the amount claimed in the complaint. Such matters required no reply. The defendant, before he could have the benefit of his allegations, was bound to establish them by proof upon the trial. As no such proof was offered at the trial, the plaintiff's cause of action was undefended.

The motion must, therefore, be denied, with costs.

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NEW-YORK COMMON PLEAS.

ELIJAH BROWN agt. GARRET W. RYCKMAN, JR.

The allegations in an answer that the plaintiff is not the owner and holder of the note, and that A. B. is the owner and real party in interest, create no issue, and amount to a mere *traversa*, which is not recognized by the Code. If these allegations were good as a denial, they would be bad for *duplicity*.

A defence may be *hypothetically* predicated upon a fact alleged in the complaint, not presumptively within the knowledge of the defendant, when he denies any knowledge or information of such a fact sufficient to form a belief. Thus, if the plaintiff is the owner of the note, he took it with notice of such failure of consideration. If he (the plaintiff) is the owner of the note, he obtained it as an attorney at law for the purpose of prosecuting it contrary to the statute.

A defendant may often be in the position, under the present system of pleading, of having no other than a *hypothetical* form of placing his defence before the court. The denial is itself, in its own nature, often hypothetical. And his rights are not to be restricted, limited, or controlled by an arbitrary rule, not of pleading, but of *verification*, which is the true question in these cases under the Code. (See 5 How. Pr. R. 14; 8 id. 59, 84, and 401; 7 Barb. 80; and 14 Barb. 533, *adverse to hypothetical pleading*.)

Special Term, March, 1856.

This is an action against the maker of a promissory note. The complaint alleges the making of the note; that it has matured; that the whole amount is due to the plaintiff; that it was endorsed and delivered to him by the payee therein named; and demands judgment for the amount thereof.

The answer, first, on information and belief, says, that the plaintiff is not the holder or owner of the note, and that E. F. Brown is the owner and party in interest. The answer then, secondly, as a separate defence, alleges that the note was given to E. F. Brown for services to be performed, and that the consideration thereby failed; and further, in this connection, that if the plaintiff is the owner, he took it with notice of such failure. The answer then, thirdly, as a separate defence says, that the defendant has no knowledge or information sufficient

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to form a belief, that the said E. F. Brown endorsed or delivered the note to the plaintiff for a valuable or any consideration. The answer then, fourthly, as a further and separate defence, alleges that the plaintiff is an attorney at law, and if he is the owner of the note, he obtained it for the purpose of prosecuting it, contrary to the statute in such case made and provided.

The plaintiff demurs to the whole of the answer, except that part of it denying the endorsement or delivery of the note by the payee, and for reasons set out in detail; but in reference to the second and fourth defences more particularly, that they are hypothetically stated.

ELIJAH BROWN, *in person.*

BEEBE & DONOHUE, *for defendant.*

BRADY, Justice. The allegations, that the plaintiff is not the owner and holder of the note, and that E. F. Brown is the owner and real party in interest, create no issue, and amount to a mere traverse, which is not recognized by the Code. They do not deny the property in, and possession of the note by the plaintiff, and yet allege the note to belong to another. If these allegations were good, as a denial, they would be bad for duplicity. Each defence must be separately stated, and be an answer to the cause of action to which it is addressed. (10 *Pr. Rep.* 68; 5 *Sand.* 210; 8 *Pr. Rep.* 242.)

Perhaps, if the denial of the endorsement or delivery was not set up as a separate defence, the allegations just mentioned would be consistent with it and sustained. As to the first defence, therefore, the demurrer is well taken, but different considerations suggest themselves as to the residue of the answer.

I am aware that in several cases hypothetical pleading has been declared to be obnoxious, (6 *Pr. Rep.* 59, 84, 401; 14 *Barb.* 533; 5 *Pr. R.* 14; 7 *Barb.* 80,) and an examination of these cases show that the peculiar form of denial, allowed by the Code, has not received the consideration which it required.

I suggest this with due deference to the learned judges who

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delivered and concurred in the opinions expressed in these cases. The case in 5 *Pr. Rep. supra*, arose where a denial on information and belief was allowed. Those referred to in 7 *Barb.* and 6 *Pr. Rep.*, were cases in which the hypothetical answers were as to the acts of the defendants, and presumptively within their own knowledge; and in the case in 14 *Barb.* Justice WILLARD, who delivered the opinion in 5 *Pr. Rep. supra*, also delivered the opinion of the court, citing in support of his views, among others, the cases mentioned. These decisions appear to be founded on a rule of the common law system of pleading, which required a plea seeking to avoid the declaration to confess directly, or by implication, that but for the matter of avoidance contained in it, the action could be maintained. (*Conger agt. Johnston*, 2 *Wend.* 96.)

Under that system there were but two pleas—the plea in abatement, and the plea of *puis darrien continuance*, which required a verification. The conscience of the party was not appealed to, and the pleader was not called upon to consider what his client could declare on oath, but what form he should adopt to place the defence on the record. But hypothetical pleading, even under that system, was not always condemned, as illustrated by Judge WOODRUFF in *Ketcham agt. Zerega*, (1 *E. D. Smith*, 553.)

The difficulty under which the defendant must rest as to the denial of what another did, which he cannot deny, being ignorant thereof, and which he cannot admit for the same reason, is not considered in any of the cases mentioned, except in the case of *Ketcham agt. Zerega*. The Code has introduced a system entirely new. It is not an alteration; it is a radical change; and § 140 not only abolishes all the forms of pleading heretofore existing, but provides that the rules by which the sufficiency of a pleading is to be determined, are prescribed by the act. This leads to the decision of the question, whether, under the Code, the answer of a defendant under oath, may be hypothetical, and, indeed, whether it can be otherwise in many cases which may arise.

The defendant, in this case, admits that he made the note

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sued, but he does not know whether it was endorsed or delivered to the plaintiff, and he denies any knowledge or information on the subject sufficient to form a belief, which puts that fact in issue. Unless he denies the allegation positively, there is no other mode of reply. He has no alternative. The act prescribes the manner of his denial, and leaves him no choice. The denial is itself, in its own nature, hypothetical. He does not know whether the plaintiff is the owner or not; but if he is, then there is a defence, and so he tells his story. It is a very natural sequence to the statement of his doubt on the subject, and that doubt, of course, he has a right, and when his conscience is appealed to is obliged, to entertain. It follows as matter of law, if the endorsement or delivery be not proved, that the plaintiff cannot recover; but whether it can be proved remains to be determined by trial. If, however, it should be proved, and the plaintiff is right in court, then the defences alleged are good; and if proved, the defendant must succeed. He cannot state the plaintiff took the note with knowledge of the failure of consideration, because he don't know whether he took the note at all or not, and his oath admonishes him on the subject. If, however, the plaintiff did take it, then he took or obtained it under the circumstances and for the purpose stated in the answer. Thus it seems that the defendant could not place his defences before the court in any other mode than the one adopted from the necessities which the new system has created; and had the alternative of admitting what might not be true, and so jeopardise his rights or brave his conscience, and assume to be false a fact alleged of which he was ignorant. This may often be the position of the defendant, in which his rights are not to be restricted, limited, or controlled by any arbitrary rule, not of pleading but of verification, which is the true question in these cases under the Code.

Judge WOODRUFF very justly remarks, in *Ketcham agt. Zerga, supra*, and at page 560, "It may often be true, that the defendant is wholly ignorant of the facts alleged by the plaintiff, and if so, he cannot be required to admit them. To compel him to do so is to do injustice."

Anonymous.

And again: "It is clear to my mind that the defendant cannot be required, as a condition of averring new matter, to make an admission of the facts alleged, which shall preclude him from denying them on the trial."

For these reasons, I think that a defence may be hypothetically predicated upon a fact alleged in the complaint, not presumptively within the knowledge of the defendant, when he denies any knowledge or information of such fact sufficient to form a belief, and, therefore, that the demurrer to the third and fourth defence is not well taken.

It was also insisted, on the argument, that the fourth defence was objectionable, because it did not set out in detail the facts and circumstances of the procurement of the note by the plaintiff to sue. The statute, before the Code, only required the defendant to give notice that he would insist upon and prove at the trial that the demand on which the action was founded had been bought and sold, or received for prosecution contrary to law without, setting forth any other particulars. (*2 Revised Statutes, 4th ed., p. 475.*) Nothing more is now required, and the fact of the procurement is alleged sufficiently for the defence it makes.

The judgment must be for the defendant, without costs to either party, and with liberty to the plaintiff to withdraw the demurrer, if he shall deem it advisable.

SUPREME COURT

ANONYMOUS.

In actions on promissory notes against the makers or endorsers, where the answers are only a denial of the allegations in the complaints, and in which no affidavits of merits are made or served, and there is no appearance by the defendants at the trials, and in which inquests are taken, the court will not pre-

Anonymous.

~~same~~ the defences had been unreasonably or unfairly conducted; bpt other facts must be established to entitle the plaintiffs to extra costs in such cases. Extra costs are not given to the plaintiff under § 308 of the Code, for the sole purpose of punishing the defendant. They should be given only in actions where two facts concur, viz., 1st. That the defence has been unreasonably or unfairly conducted: 2d. That the ordinary costs are insufficient to compensate the plaintiff for his expenses in the action.

In actions on promissory notes, where the answers contain only a denial of the allegations in the complaints, slight evidence only will be required beyond the facts appearing by the pleadings, to authorize the court to award extra costs to the plaintiffs where inquests are taken.

Madison Circuit, February, 1856.

BALCOM, Justice, presiding. Inquests were taken in several actions on promissory notes against the makers, and in some against the endorsers, in which the answers were simply a denial of the allegations in the complaints. The plaintiffs asked for extra costs under § 308 of the Code, on the ground that the defences had been unreasonably or unfairly conducted.

BALCOM, Justice, held, that extra costs were not given to the plaintiff in such cases, for the sole purpose of punishing the defendant; and said that a percentage on the recovery should be allowed only in cases where the ordinary costs would be insufficient to compensate the plaintiff for his expenses in the action, although the defence had been unreasonably or unfairly conducted; and that he would not *presume* the defence had been unreasonably or unfairly conducted in actions on promissory notes, where the answers were only a denial of the allegations in the complaints, and in which there were no affidavits of merits filed or served, and no appearance by the defendants to prevent the taking of inquests. That two facts must be established before he would allow the plaintiffs a percentage on their verdicts in these actions: 1st. That the defences had been unreasonably or unfairly conducted, and that slight evidence only would be required in the cases beyond those appearing by the pleadings. 2d. That the ordinary costs were insufficient to compensate the plaintiffs for their expenses in the actions.

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Such proof was made in these actions, and a percentage on the verdicts was allowed the plaintiffs, sufficient to cover their expenses in the actions over and above the ordinary taxable costs, recoverable of the defendants.

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SUPREME COURT.

AMOS S. SCOVILL agt. JOHN NEW.

If an allegation in a complaint be such that the defendant, being examined as a witness, would not be obliged to answer as to its truth, he may, when pleading, *deny* the allegation, and *omit to verify* his answer. But if the defendant, in pleading to such an allegation, declines to answer it at all, on the ground that such answer might subject him to a criminal prosecution, he *admits* it, for the purposes of the action.

Albany Special Term, Aug., 1855.

MOTION that defendant be required to make his answer more definite, &c.

The action was for a libel published in the *Albany Switch*, of which the defendant was alleged to be the editor and proprietor. The defendant, in his answer, denied each and every allegation of the complaint, except the allegation that he was the *proprietor* and publisher of *The Switch*, which allegation he declined to answer on oath, on the ground that an answer to that allegation might subject him to a criminal prosecution.

The plaintiff moved that the defendant be compelled to make his answer more definite and certain, by amendment, and to admit or deny the allegation in the complaint, that he is the editor, proprietor and publisher of the newspaper therein mentioned; or, that the portion of the answer relating thereto be stricken out as irrelevant.

F. TOWNSEND, *for plaintiff.*

S. G. COURTNEY, *for defendant.*

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HARRIS, Justice. It is now provided by law that the verification of any pleading may be omitted, when the party, if examined as a witness, would be privileged from testifying to the truth of the matter denied by the pleading. (*Sess. Laws*, 1854, p. 153.) The provision has reference to the denial of some allegation in a pleading. If the allegation be such that the party, being examined as a witness, would not be obliged to answer as to its truth, he may, when pleading, deny the allegation, and omit to verify the pleading.

This the defendant has not done. Instead of denying the allegation that he was the editor, &c., of the *Switch*, as he might have done, if he would have been privileged from testifying to that fact as a witness, and then serving his answer without a verification, he has not, in terms, either admitted or denied the allegation. He has merely stated that he declines to answer the allegation at all, on the ground that such answer might subject him to a criminal prosecution. The effect of such an answer is, to admit, for the purposes of the action, the allegation in question.

The 168th section of the Code declares, that every material allegation of the complaint, not controverted by the answer, shall be taken as true. Upon the trial, therefore, as the pleadings in the action now stand, it must be assumed without further proof, that the defendant is the editor, proprietor and publisher of the paper mentioned. He has not controverted the fact. It is therefore to be taken as true.

If I am right in this view of the question, it follows that the plaintiff has no occasion to complain of the answer. The defendant probably intended to put in issue the allegation in question. In this he has failed. If, however, the motion to strike out that portion of the answer embraced in the notice should prevail, it would leave all the allegations in the complaint denied. This, of course, the plaintiff would not desire.

The motion therefore, must be denied, but without costs.

Thomas agt. Desmond.

SUPREME COURT.

SAMUEL THOMAS agt. TIMOTHY DESMOND.

The plaintiff brought his action on a contract for the payment of money, made by the defendant with Martin Allen and wife, and alleged his title to the cause of action as follows: that he [plaintiff] "is now the sole owner of the said demand against the said defendant."

Held, that this was *insufficient*. It is merely an allegation of a conclusion of law. Some fact or facts should be stated, showing how the plaintiff became the owner of the demand.

Seneca Circuit and Special Term, April, 1855.

DEMURRER to complaint.

JAS. C. SMITH, *for defendant.*

W. BURTON, *for plaintiff.*

WELLES, Justice. The action is for the recovery of money, upon a contract between the defendant of the one part, and Martin Allen and Caroline his wife of the other part. The complaint alleges a breach, on the part of the defendant, of that contract. The only title the plaintiff shows to the cause of action is by an allegation in the complaint in the following words, *viz.* :—

"That the said plaintiff is now the sole owner of the said demand against the said defendant." This I do not think is sufficient. It is merely an allegation of a conclusion of law. The defendant has a right to be informed by the complaint, how the plaintiff became the owner of the demand; whether by purchase, assignment, operation of law, or how otherwise. Some fact or facts should be stated by which it would appear how he became such owner. (*Russel agt. Clapp, 7 Barb. 482; Bentley agt. Jones, 4 How. Pr. R. 202; M' Murray agt. Thomas, 5 id. 14; Parker agt. Totten, 10 id. 233.*)

There must be judgment for the defendant, with leave to the plaintiff to amend his complaint on the payment of costs.

Hagins agt. De Hart.

SUPREME COURT.

FRANCIS HAGINS agt. WILLIAM DE HART.

In an action for an assault and battery, where the allegation in the complaint was, that the defendant, at a time and place specified, "assaulted and beat the plaintiff," to his damage, &c., held, the plaintiff might amend his complaint, on the trial, and without terms, by inserting a charge therein, that the defendant, at the same time and place, and in the same transaction, "wounded the plaintiff and bit off both of his ears."

Tompkins Circuit, Feb. 6, 1856.

On the trial of this action before Mr. Justice BALCOM, at the Tompkins circuit, the plaintiff proved by a witness that the defendant, in July, 1854, at the town of Lansing, in said county, assaulted the plaintiff, and threw him down, and jumped upon him. The plaintiff's counsel then offered to prove that, at the same time and place, and in the same scuffle, the defendant, before he got off of the plaintiff, "wounded him, and bit off both of his ears." To this evidence the defendant's counsel objected, on the ground that the complaint simply charged the defendant with "assaulting and beating the plaintiff."

BRUIN & WILLIAMS, for plaintiff.

DANA, BEERS & HOWARD, for defendant.

BALCOM, Justice, overruled the objection, and gave the plaintiff leave to amend his complaint by inserting therein a charge that the defendant, at the time and place mentioned in the complaint, and in the same scuffle, "wounded the plaintiff, and bit off both his ears."

The defendant's counsel claimed, that the defendant was not then prepared to defend the charge for wounding the plaintiff, and biting off his ears; but the justice said he was not satisfied such claim was well founded, and remarked that he thought if the defendant was then prepared to defend the charge of "as-

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"maltreating and beating the plaintiff," he must be prepared to defend his entire conduct during the transaction or scuffle between the parties, including that of "wounding the plaintiff, and biting off his ears"—if he had any defence to such charge; and he refused to impose any terms for allowing the plaintiff thus to amend his complaint.

The proof was given, which showed the defendant did the acts complained of under great provocation from the plaintiff, and the plaintiff had a verdict for only \$51.

SUPREME COURT.

LAWRENCE LYNCH agt. EZEKIEL DAVIS.

An action cannot be sustained under the laws of 1847 (*sess. Laws, 1847, p. 575*) by a plaintiff as *administrator* of his deceased wife, for alleged mal-practice and injuries received by her from the defendant. The right of action is vested in the plaintiff as the *husband* of his wife, and not as administrator.

Rensselaer Special Term, June, 1855.

DEMURRER to complaint.

The action was brought by the plaintiff as administrator of his deceased wife.

The complaint alleges that the defendant, holding himself out to the public as a physician and surgeon, well skilled in the practice of the profession, was, on the 6th of March, 1854, employed by the plaintiff, for reasonable hire and reward to be paid therefor, to attend upon his wife in her confinement—she being then pregnant and heavy with child, and seized with the pains of labor, and confined in child-bed, and to deliver her of the child with which she was so pregnant and laboring; that, being grossly ignorant of his profession, the defendant neglected and omitted to remove the *placenta*, or after-birth, and, by means of such neglect and omission, bleeding ensued, thereby causing

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the death of the wife. Wherefore, the plaintiff, as administrator, &c., claimed damages to the amount of \$5,000, besides costs.

To this complaint the defendant demurred, on the ground that the facts stated did not constitute a cause of action.

JOHN J. VIELE, *for plaintiff.*

ABRAHAM B. OLIN, *for defendant.*

HARRIS, Justice. If the cause of action stated in the complaint is to be regarded as a breach of the obligation implied in the employment of the defendant as a physician, the right of action was vested in the plaintiff, as the *husband* of his wife, and not as administrator. The contract to perform his professional duty in a skilful manner was made with the husband, and not the wife.

In an action founded upon this breach of duty, the husband might recover the damages he had sustained by reason of the loss of the society and aid of his wife. It may not be improper to state, that at the same circuit at which this issue was tried, an action brought by the husband in his own right, for the same case of *mal-practice*, was brought to trial, and the plaintiff recovered such damages as the jury thought fit to award to him for the loss of his wife.

If the action had been founded upon the wrong committed by the defendant, and the personal suffering that resulted to the wife, she could not have sued alone, if living; but the husband must have been joined as a plaintiff with her. (1 Chit. Pl. 78.) It would, indeed, have been the action of the husband, though the wife, being the *meritorious cause*, must have been joined with him as plaintiff. Upon the death of the wife, the cause of action, so far as related to her, did not survive at common law.

The act of 1847, (*Sess. Laws*, 1847, p. 575,) upon which the plaintiff relies, only gives an action to the personal representatives of the person injured and dying, when the person so injured, if living might have maintained an action, and recovered

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damages for the same injury. The common law gave the husband and the father a right to recover of the wrong-doer the pecuniary injury he had sustained by reason of the killing of his wife or child. The husband had availed himself of this right of action, in this very case, to recover damages for the loss of his wife. The object of the act of 1847 was, to extend the same rule to the wife and the child, so that they also might recover the pecuniary damages they had sustained by the wrongful killing of the husband or the father. Hence, the proper rule of damages, in all such cases, is to inquire what the party killed was worth to his family. The husband has already had the benefit of this same rule as applicable to the same injury of which he now complains. It would be an obvious perversion of the intention of the legislature to allow a second action to be sustained for precisely the same injury.

Nor is there anything in the language of the act referred to which would warrant such an action. The wife, if living, could not have sustained an action for the injury. The action, as we have seen, must have been either in favor of the husband alone, or the husband and wife as joint plaintiffs. The case is, therefore, neither within the terms nor the intent of the statute.

The demurrer must be allowed, and the complaint dismissed, with costs to be taxed.

Adams agt. Holley, adm'x.

SUPREME COURT.

Wm. H. Adams agt. MARY K. HOLLEY, Administratrix, &c.

It seems, the old common money counts are still good—"for money had and received by the said intestate to the use of the plaintiff"—"for money paid, laid out and expended by the plaintiff for the said intestate, and at his request"—"for money lent and advanced by the plaintiff to the said intestate, and at his request." (*See Allen agt. Patterson, 3 Seld. 476.*)

A plaintiff may include any number of items in one count, or statement of a cause of action. (*Code, § 158.*) But this right, where the action is for a *legal* remedy, in distinction from equitable relief, should be confined to cases where the items accrued to him in his own right, as distinguished from such as came to him by assignment under the Code, and for which, before the Code, he could not sustain an action in his own name.

And where all such items are intended to be embraced in one action, they should be stated in separate counts—that is, in classes—so that one count should embrace those items which accrued to him individually or in his own right, and another those that have been assigned to him; and, where assigned by different persons, there should be a count for each of such classes.

A statement of a cause of action for an accounting in relation to the payment and receiving of moneys, and to other matters and transactions respecting the purchase by the plaintiff and others of a farm of land, and the sale in parcels of the whole, or portions of the same, the plaintiff alleging he had become the owner of all the rights and interests of the others, constitutes but one cause of action, which (although connected with others for a legal remedy) must be considered an *equitable* cause of action. And such a statement of a cause of action will be required to be made definite and certain, especially in reference to the allegation of the plaintiff's title to the rights and interests of the other proprietors of the farm. The allegation that he is the owner, &c., is only a legal conclusion: he should state some issuable fact by which it would appear that he was the owner.

Cayuga Special Term, Nov., 1854.

MOTION for an order to strike out the 14th count, or statement of cause of action in the complaint, on the ground that it contains several causes of action not separately stated; and if not struck out, to have the same made definite and certain by amendment, stating in what respect. Also, that the 11th, 12th, and 13th counts or causes of action be made definite and certain, &c.

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The 11th, 12th, 13th and 14th counts of the complaint are as follows:—

“*11th cause of action.* The plaintiff alleges that the said intestate, at the time of his death was indebted to the plaintiff in the sum of six thousand dollars, for money had and received by the said intestate to the use of the plaintiff, and that no part thereof has been paid to the plaintiff.

“*12th cause of action.* The plaintiff alleges that the said intestate, at the time of his death, was indebted to the plaintiff in the sum of six thousand dollars, for money paid, laid out and expended by the plaintiff for the said intestate, and at his request, and that no part thereof has been paid to the plaintiff.

“*13th cause of action.* The plaintiff alleges that the said intestate, at the time of his death, was indebted to the plaintiff in the sum of six thousand dollars, for money lent and advanced by the plaintiff to the said intestate at his request; and that no part thereof has been paid to the plaintiff.

“*14th cause of action.* And the plaintiff further alleges, that during the lifetime of the said John M. Holley, deceased, to wit, from the first day of January, 1826, to the time of the death of the said John M. Holley, this plaintiff and the said John M. Holley were, at sundry times during the said time, jointly interested, and joint owners and tenants in common, with Augustine H. Lawrence, Myron Holley and Abraham L. Beaumont, now deceased, and Samuel Hecox and Nelson Stafford, in certain lands and real estate, situated in Lyons, county of Wayne, and state of New-York, and known as the Riggs' farm property, which lands were, to a large amount during the said time, sold out in parcels and village lots, by the proprietors thereof; and were so joint owners of divers bonds, mortgages, and contracts for the payment of money arising out of sales of said land and real estate: that divers sums of money were received for sales of the said lands and real estate, and for the rents thereof, by the said John M. Holley in his lifetime, which were the moneys of all the proprietors of said lands, and to be accounted for to all the said proprietors by the said John M. Holley: that the other said proprietors also received divers sums of money for the said

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lands and real estate, and for the rents thereof, which were the moneys of all the said proprietors of said lands, and to be accounted for to all the said proprietors of said lands: that the plaintiff, during the time, paid, laid out and expended large sums of money, that were due for the purchase of the said lands and real estate, and that were due for improvements upon the said lands, and for articles of personal property purchased for the use of said land and real estate, and for the benefit of all the said proprietors, and by the said proprietors at the time of such purchase and expenditure; which said moneys, so paid out and expended by the plaintiff for the said John M. Holley and other said proprietors, were to be accounted for by them, and paid to the plaintiff in just proportions, according to the rights and liabilities of all the said proprietors respectively, upon an accounting and settlement of the affairs of said Riggs' farm property among the said proprietors; and the plaintiff alleges that the said John M. Holley, during his lifetime, became and was, and was at the time of his death, largely indebted to the plaintiff by reason of the said receipts of money by the said John M. Holley, in his lifetime, and by reason of the said payments and expenditures by the plaintiff, as above stated; and the plaintiff alleges that no accounting or settlement of the accounts among the said proprietors was made before the death of the said John M. Holley. And he alleges that no accounting or settlement of the said accounts was ever had or made between the plaintiff and the said John M. Holley, nor between the plaintiff and the said defendant as administratrix aforesaid; and that the said defendant, as administratrix as aforesaid, is still largely indebted to the plaintiff on account of the said receipts by the said John M. Holley in his lifetime; and on account of the said payments, by the plaintiff, for the said John M. Holley and the said proprietors of the said lands and real estate, to wit, in the sum of six thousand dollars."

WILLIAM CLARK, *for defendant.*
F. E. CORNWELL, *for plaintiff.*

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WELLES, Justice. The objection to the 11th, 12th and 13th counts, I think, are disposed of by the case of *Allen agt. Patterson*, (3 Seld. R. 476.) The motion in regard to those counts is denied.

In regard to the 14th count:—A plaintiff may include any number of items in one count or statement of a cause of action. (*Code*, § 158.) But this right, where the action is for a legal remedy in distinction from equitable relief, I think, should be confined to cases where the items accrued to him in his own right, as distinguished from such as came to him by assignment under the Code, and for which, before the Code, he could not sustain an action in his own name. If he desires to embrace them all in one action, he should state them in separate counts—that is, in classes—so that one count should embrace those items which accrued to him individually, or in his own right, and another, those that have been assigned to him; and, in case he wishes to include causes of action assigned to him by different persons, there should be a count for each of such classes. This is necessary to prevent confusion, and to enable the defendant to answer understandingly the different charges and allegations of the plaintiff.

But the 14th statement of a cause of action in this case may, and I think should, be regarded in the light of an equitable action; and the objection that it contains several causes of action, not separately stated, should not prevail. It contains a case for one accounting in relation to the payment and receiving of moneys, and to other matters and transactions, respecting the purchase by the plaintiff, the intestate, and others, of the Riggs' farm, and the sale, in parcels, of the whole, or portions of the same. It is, in fact, but one cause of action.

All the allegations embraced in the count under consideration relate to the enterprise of parties referred to of the purchase and sale of this farm, and, I think, should be disposed of in one accounting. I am satisfied that, under the former practice in the court of chancery, the objection to this cause of action, of multifariousness, would not have been sustained.

But there is another objection to the count in question, which

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I do not see but must prevail. It is that of vagueness and uncertainty.

The plaintiff, to show his right to call the representative of Holley *alone* to account, alleges that, before and since the death of Holley, &c., the plaintiff became and was the owner of all the interests, rights and claims of all the other proprietors in and upon the said bonds and mortgages, and contracts for the payment of moneys for the said lands, and the owner of all accounts of the other said proprietors for money received by Holley on account of the said lands and real estate, and that the moneys due from said Holley, at the time of his death, to all the said proprietors, became, and were, and still are, the property of the plaintiff, &c. Here is no fact alleged showing the plaintiff's title to the rights and interests of "other proprietors," of which he claims to be the owner.

The defendant has the right to be informed how and when the plaintiff became the owner of the rights and interests of the respective proprietors. The plaintiff only alleges that he is the owner, &c., which is only a legal conclusion. He should state some issuable fact, by which it would appear that he was the owner. Such, for example, as that the interests had been assigned to him.

The other objections of uncertainty, I think, may be reached by a bill of particulars, or the practice which formerly prevailed in the master's office of bringing in accounts, and of charges and surcharges, which should still prevail before a referee.

An order may be entered, that the plaintiff make his complaint more certain by amendment, according to the views herein expressed, and that such amendment be served in twenty days after notice of such order; or, in default thereof, that the 14th count, or statement of cause of action, be stricken out. No costs of the motion to be allowed to either party.

Sweet agt. Ingerson.

SUPREME COURT.

CURRAN E. SWEET agt. DAVID INGERSON.

Under § 167 of the Code, two causes of action may "arise out of the same transaction," but not at all be connected with "*the same subject of action.*" For instance, a count in assumpsit on an alleged warranty of a horse, and a count for fraud and deceit in wrongfully concealing the defects of the same horse. These causes of action are inconsistent with each other.

The object of § 167 probably was, to allow the plaintiff to include in his complaint two or more causes of action, actually existing, arising out of the same transaction, and where a recovery might be had for both in the same action; and that the joinder must be of those causes of action which are consistent with, not those which are *contradictory* to each other.

It seems, that the tendency (properly so) of the decisions of the courts upon this section, has been to restrict, rather than to enlarge its operation.

Oneida General Term, Jan., 1856.

PRATT, W. T. ALLEN and BACON, *Justices.*

THIS was a demurrer to the complaint, on the ground that it improperly united two causes of action. The plaintiff, in one count of his complaint, claimed to recover for the breach of a contract of warranty on the sale of a horse, and in the second claimed damages for a fraudulent representation in regard to the quality and condition of the same horse. At the special term, judgment was given for the plaintiff on the demurrer, and from this judgment the defendant appealed.

MORGAN, *for defendant.*

DAVID, *for plaintiff.*

By the court—BACON, Justice. It is somewhat difficult to determine the precise extent and boundaries of the first subdivision of § 167 of the Code, which provides for the joinder of causes of action "where they arise out of the same transaction, connected with the same subject of action."

In this case, the plaintiff, in his complaint, first counts in as-

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sumpsit on an alleged warranty of the horse, which was the subject of the sale; and in the second count, for fraud and deceit in wrongfully concealing the defects of the same horse.

It may be true, that these causes of action arise out of the same transaction, to wit, the bargain for the purchase of the horse; but are they connected with *the same subject of action?*

The "subject of the action" is either the contract of warranty, or it is the fraudulent concealment of the defects complained of. These causes of action cannot consist with each other. They demand a totally different line of proof, a different judgment, and different process for enforcing a final recovery.

The plaintiff cannot recover in both, though he may have his election to bring either. I am inclined to think, therefore, that the object of the section was to allow the plaintiff to include in his complaint two or more causes of action actually existing, arising out of the same transaction, and where a recovery might be had for both in the same action; and that the joinder must be of those causes of action which are consistent with, not those which are *contradictory* to each other. This is in accordance with the decision in *Smith agt. Hallock*, (8 How. 78,) where it was held that a plaintiff could not join, in his complaint, a claim to recover possession of real estate, and damages for withholding the same, with a claim for damages for obstructing him in the use of it.

So, in *Hulce agt. Thompson*, (9 How. 113,) it is held that this section does not authorize the joining of a claim in ejectment for a house and yard, with a claim in trespass for cutting grass and destroying fences on the farm. And in *Cohwell agt. New-York & Erie Railroad Co.*, (9 How. 312,) it is decided, that a claim for damages for taking and injuring cattle cannot be joined with a claim in an agreement to carry the cattle on the railroad.

These cases, although it may not be asserted, perhaps, that they are precisely in point, yet seem to me to settle the general principle, that contradictory causes of action cannot, even under the liberal provisions of § 167, be united, and indicate a pur-

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pose on the part of the courts to restrict, rather than enlarge the operation of that section.

I think this should be the construction of this section of the Code, and am of the opinion that the judgment should be reversed.

SUPREME COURT.

GEORGE W. COBINE agt. CYNTHIA ST. JOHN and PETER ST. JOHN, her husband.

No purely legal action can be maintained on the promissory note of a married woman.

Equitable actions may be brought to enforce the payment of the promissory notes of married women, out of property owned by them at the time of the execution of such notes, provided such notes are made for the benefit of their separate estates, or for their own benefit upon the credit of such estates.

Married women are not *personally* liable for the payment of debts contracted by them during coverture; and the statutes of 1848 and 1849, "for the more effectual protection of the property of married women," have not changed this common-law rule.

No *personal* judgment can be rendered against a married woman for a debt contracted by her during coverture.

In equitable actions, to charge the separate estates of married women with debts contracted by them during coverture, the demand for judgment should be, that the separate estate of the wife be charged with the payment of the debt set out in the complaint; and that her separate estate be applied to the payment of such debt; and that a receiver be appointed to take possession of such estate, and dispose of the same, or so much thereof as shall be necessary to satisfy such debt and the costs of the action.

In such actions, the complaint should show the nature of the debt, and, if it be evidenced by a promissory note or bond, the consideration thereof; and that the wife had a separate estate at the time the debt was contracted; and of what it consisted, and its situation and value; and that she made, or intended to make, the debt a charge or lien on such separate estate at the time she contracted it.

The supreme court has jurisdiction of such equitable actions, although the amount of the debt in dispute is less than one hundred dollars. *Sensible*—A

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court of a justice of the peace has not jurisdiction of an action on the promissory note of a *feme covert*.
Whether payment of a note or bond, executed by a married woman as *surety*, can be enforced against her separate estate—*querre?*

Delaware Special Term, Jan., 1856.

DEMURRER to the complaint.

This action was brought upon a promissory note, set out in the complaint as follows:—

“ *Walton, New Road, Sept. 13, 1854.* ”

“ Six months from date, I promise to pay George W. Cobine fifty-eight dollars, with use.

[Signed]

“ **CYNTHIA ST. JOHN.** ”

The complaint showed that the defendant Cynthia St. John was the wife of the defendant Peter St. John at the time she executed the note. The demand for judgment in the complaint was as follows—to wit:

“ The plaintiff demands judgment for the sum of fifty-eight dollars, with interest from the 13th day of September, 1854, and costs.”

SAMUEL GORDON, for plaintiff.

WHITE & GLEASON, for defendants.

BALCOM, Justice. No action at law could be maintained on the promissory note of a married woman prior to the statutes of 1848 and 1849, “ for the more effectual protection of the property of married women.” When married women gave their promissory notes, for the benefit of their separate estates, or for their own benefit upon the credit of such estates, suits in equity were sustained, to make such notes a charge upon their separate estates; and such estates were appropriated by the court to the payment thereof. But the court did not make *personal* decrees against married women for the payment of such notes. *Femes covert* were allowed to encumber and charge their separate property with debts, almost as freely as *femes sole* could encumber their property. The authorities sustaining

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these propositions are very numerous. (*The N. A. Coal Co.* agt. *Dyett*, 7 *Paige*, 9; 20 *Wend.* 570; 15 *Barb.* 28; 4 *id.* 407; 22 *Wendell*, 526; 1 *Sand. Ch. R.* 17; 2 *id.* 287; 3 *id.* 104; 1 *Barb. Ch. R.* 34; 3 *id.* 11; 1 *Coms.* 452; 2 *Story's Eq. J.* § 1,400, pp. 843 & 844; 2 *Kent's Comm.*, 4th ed., 163 to 170; *Marshall* agt. *Rutton*, 8 *Tenn. R.* 545; 11 *How. Pr. R.* 285; *id.* 486; 4 *Comstock*, 9; 17 *Johns. R.* 548; 15 *Barb.* 555; See *English decisions collected in Law Library, (New Series,) vol. 51, chap. 7, p. 518.*)

The statutes of 1848 and 1849 have not removed the common law disability of married women to make valid executory contracts, unless such contracts are for the disposition of their separate property. These enactments operate as between the husband and the wife. They prevent the former from having any legal interest in the property of the latter; and they empower the wife to manage and dispose of her separate property, without the consent or interference of the husband. Here they stop. They do not authorize her to go into trade, and embark in commercial enterprises as a *feme sole*. (10 *How. Pr. Reps.* 109.) The husband's right to her society and her services remains unimpaired. (*Lovett* agt. *Whitbeck*, 7 *How. Pr. R.* 105.) The wife has no more right, since these statutes were enacted, to contract debts, irrespective of her separate property, than she had before they became laws. She is still regarded as a *feme covert*, as to all business transactions, outside of the management and disposition of her separate estate. She can mortgage that, or charge it with the payment of debts that she contracts in regard to it, or for her own benefit, on the credit of it; and some of the decisions show that her separate estate may be charged, in equity, with the payment of notes, where she signs as surety of her husband; but whether they are to be sustained to this extent need not now be determined.

It is well settled, that a married woman is not *personally* liable for the payment of any debt she may contract during coverture. The creditor cannot have a judgment against her personally. He can reach the property she may own at the time she contracts the debt; but he can never touch any prop-

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erty she may afterwards acquire. The debts which are made a charge upon her separate property by the court, are such as operate by way of pledge or mortgage, or appointment of her property for the payment thereof. The creditor must be content with that portion of her estate upon which his debt can be made a charge, without having any right to charge her *personally* with the payment of any deficiency after such estate is exhausted.

If a married woman owns no property the day she gives her note, the obligation is void, and it remains perfectly worthless, although she thereafter has millions of property. She can only charge the property she has at the time she contracts debts. Her promises to encumber her future acquisitions are void. She is not personally liable therefor. If the statutes of 1848 and 1849 make her promises personally binding on her when she has property, then they are valid if made when she has none; and by such a construction of these statutes she would be personally liable on notes and bonds made by her during coverture, just as she would be were she a *feme sole*. Such could not have been the intention of the legislature. The declaration of Lord MANSFIELD, "that, as times alter, new customs and new manners arise," is no authority for such an interpretation of these enactments. They were framed more effectually to protect married women in the enjoyment of their property, and not to enable others to more easily get it from them.

In equitable actions, to charge the separate estates of married women with debts contracted by them during coverture, the demand for judgment should be, that the separate estate of the wife be charged with the payment of the debt set out in the complaint; and that her separate estate be applied to the payment of such debt; and that a receiver be appointed to take possession of the estate of the wife, and dispose of the same, or so much thereof as shall be necessary to satisfy such debt and the costs of the action. In such actions the complaint should show the nature of the debt; and, if it is evidenced by a promissory note or bond, the consideration thereof, and that the wife had a separate estate at the time the debt was con-

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tracted, and of what it consisted, and its situation and value; and that she made, or intended to make, the debt a charge or lien on such separate estate at the time she contracted it.

The question, whether an equitable action can be sustained in the supreme court, on a demand for less than one hundred dollars, is presented by this demurrer; and the case of *Shepard* agt. *Walker* (*7 How. Pr. R.* 46) is relied on to show that such an action cannot be maintained. The statute in force at the time of the adoption of the present constitution was, that "the court of chancery shall dismiss every suit concerning property, where the matter in dispute, exclusive of costs, does not exceed one hundred dollars." (*2 R. S.* 173, § 87.)

Section 3 of article 6 of the constitution declares, that "there shall be a supreme court, having general jurisdiction in law and equity." This provision confers jurisdiction upon the supreme court of all kinds of actions, both legal and equitable, without regard to the amount claimed, the nature of the relief demanded, or the value of the property or right in dispute. The statute before mentioned was enacted when equity and legal jurisdictions were separate; and when they were exercised by two distinct courts; and for the purpose of excluding small causes from the court of chancery, where the costs were enormous, which could as well be determined in the courts of law. It could not have been the intention of the legislature to deny parties all relief in the courts concerning property, where the amount in controversy did not exceed one hundred dollars. The sole object of the legislature must have been, to specify the court in which actions concerning property not exceeding one hundred dollars in value should be brought.

The preamble to the Code reads, "whereas, it is expedient that the present forms of actions and pleadings, in cases at common law, should be abolished; and that all *distinction* between legal and equitable *remedies* should no longer continue; and that a uniform course of proceeding in *all cases* should be established." The Code defines an action, and for some purposes a distinction is yet made between legal and equitable actions; but the distinction is in the pleadings, the mode of trial,

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and the manner of giving and enforcing the judgment. The only difference as to the costs in legal and equitable actions, under the Code, consists in the fact, that they depend on the amount of the judgment and for which party it is given in legal actions, and are given or withheld, in the discretion of the court, in actions of an equitable nature, without particular regard to the amount in controversy, or the amount of the recovery, or for which party the judgment is given.

No provision is made for the dismissal of equitable actions concerning property, with costs, where the amount in dispute does not exceed one hundred dollars. And it may well be doubted whether the constitution and the Code have not virtually repealed the section of the Revised Statutes before quoted, making it imperative upon the court to dismiss every equitable suit concerning property where the matter in dispute, exclusive of costs, does not exceed one hundred dollars, with costs to the defendant. If the judiciary act of 1847 made this statute applicable to all equitable actions in the supreme court; the Code is so much in conflict with that act, that it must be deemed repealed. Much injustice will inevitably be done, unless this statute is considered repealed. It can be so considered, without doing violence to the settled rules for the construction of statutes—and no particular mischief will flow from such a ruling.

If this statute is still in force, the plaintiff in this action is remediless, unless a justice of the peace has jurisdiction to try equitable actions, to charge debts contracted by married women upon their separate estates, and compel the payment of such debts out of such estates; and it is not claimed that justices of the peace have jurisdiction of such actions.

All the authorities agree that a purely legal action will not lie on the promissory note of a *feme covert*. Now, is the plaintiff in this action entirely without a remedy, provided he shall, by an amended complaint, show this court that he has a good equitable cause of action against Mrs. St. John?

Chancellor WALWORTH, in *Dow* agt. *Shelden*, (2 Paige, 324,) clearly intimated that he would not consider the statute before mentioned as depriving him of jurisdiction of a foreclosure suit,

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where less than one hundred dollars was due on the mortgage, if the mortgagee had no remedy except to foreclose by suit; and he said, "where the complainant had no other remedy, as where it appeared from the bill that the whole amount of the mortgage money was less than one hundred dollars, that the defendant was in possession, and was insolvent, so that satisfaction could not be obtained by a suit at law, and that there was no power of sale, or that there were subsequent incumbrancers, so that the mortgage could not be foreclosed by advertising for six months, this court might consider it an implied exception in the statute."

The same learned chancellor, in *Brown agt. Brown*, (1 *Barb. Ch. R.* 217,) used the following language: "Where no remedy exists elsewhere to enforce a right, this court will furnish such a remedy whenever it is necessary to prevent a total failure of justice." (See 1 *Barb. Ch. R.* 490.)

There must be a total failure of justice, in actions to charge the separate estates of married women, with debts of less than one hundred dollars, contracted by them during coverture, unless this court has jurisdiction of such actions. No other court can enforce such debts, and compel their payment; but this court can do so, whether it derives its authority from the constitution and the Code, or from an implied exception in the statute concerning the dismissal of suits by the court of chancery, where the amount in question does not exceed one hundred dollars; and justice requires it should do so.

But for other reasons, before assigned, the complaint in this action is defective. It does not state facts sufficient to constitute a cause of action against a married woman, on a promissory note made by her during coverture.

Judgment is, therefore, ordered for the defendants on the demurrer, with leave to the plaintiff to amend his complaint on payment of costs.

Lampert agt. Abbott.

SUPREME COURT.

JOHN T. LAMPORT agt. THOMAS ABBOTT.

An action brought by the chamberlain of a city [Troy] against a defendant for a *penalty*, in violating a city ordinance, in the erection of a frame building, and asking for a temporary injunction, to restrain the defendant from proceeding with the building pending the litigation, are two kinds of relief *inconsistent* with each other.

That is, the plaintiff, in the same action, cannot have a recovery for the violation of an ordinance, and at the same time have such violation restrained. The facts which would establish the plaintiff's right to recover the penalty might be very far from establishing his right to the equitable relief of injunction.

Besides, the building of the defendant may or may not be a nuisance. If it be, it is for those *injured* by it, and not the *chamberlain*, to take measures to suppress it—his interest is limited to the recovery of the penalty.

Rensselaer Special Term, June, 1855.

MOTION to dissolve injunction.

The action was brought by the plaintiff as chamberlain of the city of Troy. The complaint states that, on the 8th day of February, 1838, the common council of Troy, in pursuance of authority vested in them by the legislature, passed a law or ordinance, requiring that all buildings which should thereafter be erected within certain limits in the said city, should be constructed of brick or stone, and covered with slate, tile, or other safe materials against fire, and imposing a fine of \$300 for the violation of the ordinance; that, in May, 1855, the defendant erected and built, within the limits specified in the ordinance, and was, at the time of the commencement of the action, finishing, a frame building of wood, and not of any material required by the ordinance, by means whereof the defendant has become liable to the penalty of \$300, imposed by the ordinance.

The complaint further states, that by means of the defendant's unlawful erection, the dwellings, buildings and other property of the citizens of Troy, in the neighborhood, are greatly

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endangered and injured in value; and that the defendant, if allowed to finish his building, intends to use it as a blacksmith's shop, thereby greatly endangering the property of citizens, &c. The relief asked for was, that the defendant might be restrained from and against finishing his building, and against using it for any purpose whatever, while it should remain where it then stood. The plaintiff also demanded judgment against the defendant for the penalty of \$300. An injunction was allowed, as asked for in the complaint.

Affidavits were read in support of the motion, tending to disprove the allegations in the complaint; but it is unnecessary to notice them more particularly, as the decision of the motion is put entirely upon the matters of the complaint.

Wm. A. BEACH, *for plaintiff.*

MARTIN I. TOWNSEND, *for defendant.*

HARRIS, Justice. A temporary injunction may be granted, when it appears by the complaint that the plaintiff is entitled to the relief demanded; and such relief, either wholly or in part, consists in restraining the commission or continuance of some act which, if committed or continued, during the litigation, would produce injury to the plaintiff. This is the criterion by which to test the plaintiff's right to an injunction upon the case, as made by himself.

In the first place, it must appear that the plaintiff is entitled to have the defendant restrained in the manner sought by the complaint. Assuming all that is stated to be true, is the plaintiff entitled to such relief? The facts stated would undoubtedly, if uncontested, subject the defendant to the penalty which the plaintiff seeks to recover. But the facts which would establish the plaintiff's right to recover the penalty might be very far from establishing his right to the equitable relief of injunction. Indeed, are not the two remedies entirely inconsistent with each other? Can the plaintiff have a recovery for the violation of the ordinance, and at the same time have such violation restrained? Under the present system of practice a plain-

Saltus agt. Kipp.

tiff may have both legal and equitable relief in the same action, but the two kinds of relief must be consistent with each other. (*See Linden agt. Hepburn*, 5 How. 188.)

Here, the plaintiff claims that he is entitled to recover a penalty, which the defendant has incurred by doing an illegal act, and at the same time that he is entitled to have the defendant restrained by injunction from doing the act. I do not think the remedies are consistent with each other.

But again: the plaintiff, to be entitled to a temporary injunction, must make it appear by his complaint, that the commission or continuance of the act sought to be restrained, during the litigation, would affect him injuriously. That is not pretended. In his official capacity, the plaintiff may be entitled to recover the penalty. To that extent the act complained of is a positive benefit to the plaintiff, or the corporation represented by him. Beyond that the plaintiff has no concern with the matter. The building erected may or may not be a nuisance. If it be, it is for those injured by it, and not the chamberlain of the city of Troy, to take measures to suppress it. The plaintiff's interest in the matter is limited to the recovery of any penalty which the defendant may have incurred.

The injunction must, therefore, be dissolved, with costs.

SUPERIOR COURT.

SALTUS agt. KIPP.

In an action of assault and battery, in which the defendant has given notice of appearance before the time for answering expired, it is irregular to apply *ex parte*, and without notice, for an order that plaintiff's damages be assessed by a jury.

In such a case, the defendant will not be permitted to put in an answer which admits the assault and battery, and merely alleges that there was provocation, which should mitigate damages. The real character of the transaction, and any matter which can properly mitigate damages, may be shown on the assessment of damages, on a default to answer.

Saltus agt. Kipp.

Special Term, Jan., 1856.

THIS is an action of assault and battery. Within twenty days after service of the summons and complaint, the defendant appeared by attorney, but made default in answering. When the time to answer had expired, the plaintiff applied *ex parte*, and obtained an order that his damages be assessed by a jury. The defendant moves to set aside that order for irregularity, and for leave to put in answer, which he produces. The answer does not deny the assault and battery, but sets up circumstances mitigating its character.

HENRY H. MORANGE, *for defendant.*

BANGS & KETCHUM, *for plaintiff.*

BOSWORTH, Justice. The order to assess damages could only be granted on an application for the relief demanded by the complaint. No notice of the application having been given, it is irregular, and must be set aside. (*Code*, § 246, sub. 2.)

The answer contains no defence. On a demurrer to it for insufficiency, judgment would be given for the plaintiff. (*Laws of 1855, chap. 44; Lane agt. Gilbert, 9 How. Pr. R. 150.*) In such a case, the damages would be assessed in the same manner as if no answer had been put in. (*Code*, § 269.)

The same proceedings may be had under the Code, in assessing damages on a default to answer, as were allowed under the old practice on executing a writ of inquiry. A defendant may call witnesses, and prove any matter which properly goes to mitigate damages. He may, of course, prove all the facts and circumstances relating to any immediate provocation, which, in judgment of law, tends to mitigate damages.

The motion for leave to put in the proposed answer is denied.

COURT OF APPEALS.

In the Matter of the Attachment against the Estate of **EZRA J. COATES** and **JOHN HILLIARD**, non-resident debtors.

In proceedings, upon attachment against an absconding, concealed, or non-resident debtor, (2 R. S. 2, Art. 1,) *every creditor*, no matter where *resident*—whether in the United States or a foreign country—has a right to exhibit his claim to the trustees appointed under the act, and, upon having it allowed, to share in the distribution of the property. But foreign creditors cannot *initiate* these proceedings here.

Where a debtor in England has received a discharge in bankruptcy there, a creditor residing there, and who has received a dividend under those proceedings, cannot claim, under proceedings upon attachment against the same debtor here, a distribution of the property in the hands of the trustees, for the simple reason that the discharge in bankruptcy has *extinguished his debt*.

March Term, 1856.

ON the 6th of December, 1847, an attachment was issued against the property of Coates and Hilliard, non-resident debtors, pursuant to Part II, Chap. 5, Title I, of the Revised Statutes. Trustees were appointed under these proceedings, and notice was given to creditors to appear and prove their claims.

David Evans, a London creditor, presented his claim to the trustees, which was rejected by them on the ground that he was excluded from participation in the fund, because the absent debtors had been discharged under proceedings in bankruptcy in England, and under which the said David Evans had received a dividend. The supreme court reversed this decision, and the trustees appealed.

MANN & RODMAN, for appellants.

WEEKS & DE FOREST, for respondent.

By the court—**JOHNSON**, Judge. One main question in this case is, whether the trustees, appointed pursuant to the statute upon proceedings by attachment against absconding, concealed,

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or non-resident debtors, are to distribute the funds which may come into their hands among all the creditors who establish their claims, or only among such as might have instituted or become parties to the attachment proceedings before the appointment of the trustees, if they had chosen to take the steps necessary for that purpose? As the right to institute such a proceeding, and the effect of it when instituted, and all the steps to be taken in the course of it depend upon standing authority, it is quite obvious that to the statute itself we must look to determine the question proposed.

In the Revised Statutes, several proceedings, all ending in the appointment of trustees of a debtor's property, and providing for its distribution, are grouped into a single title, consisting of eight articles. Article 1st, is "of attachments against absconding, concealed and non-resident debtors;" the 2d, "of attachments against debtors confined for crimes;" the 3d, "of voluntary assignments made pursuant to the application of an insolvent and his creditors;" the 4th, "of proceedings, by creditors, to compel assignments by debtors imprisoned on execution in civil cases;" the 5th, "of voluntary assignments by an insolvent for the purpose of exonerating his person from imprisonment;" and the 6th, "of voluntary assignments by a debtor imprisoned on execution in civil cases." Those six are the several kinds of proceeding specified. The 7th article consists of general provisions applicable to proceedings under the several preceding articles, or some of them; and the 8th treats of the powers, duties and obligations of trustees and assignees under this title. (2 R. S. 1.)

In proceedings under the first article, the debtor may, within a certain time, appear and have the attachment discharged, upon either paying those creditors who have procured the attachment, or who have made themselves parties to the proceeding under the provisions of the statute, or giving security to them in a prescribed manner. If he fail to do this, three or more persons are to be appointed "to be trustees for all the creditors of such debtor," (2 R. S. 12, § 58.)

By article 8, § 1, (2 R. S. 40,) all trustees appointed in pur-

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suarce of either of the preceding articles, are declared to be trustees of the estate of the debtor in relation to whose property they shall be appointed, for the benefit of his creditors, and are to have the powers and be subject to the obligations thereafter declared. By § 7, sub. 8, (2 R. S. 42,) they have power "to settle all matters and accounts between such debtor and his debtors or creditors." By § 8, (2 R. S. 42,) they are required to give notice of their appointment, and therein to call upon all the creditors of such debtor to deliver their respective accounts and demands to the trustees by a day specified. They are, within fifteen months from their appointment, to call a general meeting of the creditors of such debtor, and at that meeting, or other adjourned meeting thereafter, "all accounts and demands, for and against the estate of such debtor, are to be fairly adjusted, as far as the same can be ascertained." (2 R. S. 46, §§ 27, 28.) They are then to proceed to pay debts due to the United States, and certain other specified preferred claims, and they are then to "distribute the residue of the moneys in their hands among all those who shall have exhibited their claims as creditors, and whose debts shall have been ascertained, in proportion to their respective demands, and without giving any preference to debts due on specialties, as follows:" in cases under the first article, "among those who were creditors at the time of the issuing of the first warrant of attachment;" (2 R. S. 46, § 33;) in cases under articles three and five, "among those who were creditors at the time of the execution of the assignment by the insolvent;" in cases under the fourth article, "among those who were creditors" at one or the other of the two periods specified; and in cases under the sixth article, "among those creditors at whose suit the debtor was imprisoned on execution at the time of his discharge."

The next section (§ 34) declares, that in making such distribution the trustees shall first pay all debts that may be owing by the debtor as guardian, executor, administrator, or trustee, and that these are to be paid in full; or, if the assets are insufficient, then in proportion to their respective amounts.

Thus far the language of the act is in itself plain. It speaks

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of all creditors. It furnishes no rule of exclusion, nor does it even hint that any are to be excluded, whose debts are ascertained, and who have claimed as creditors. On the contrary, a strong inference that no such exclusion was intended is afforded by the contrast between the declared duties of the trustees under the sixth article and under the others. Under that article the distribution is among the creditors at whose suit the debtor was imprisoned. Under the other articles, the only way in which the generality of the term "creditors" is at all restrained, is by fixing the time at which they must have been creditors, to entitle them to share in the distribution. When the legislature has fixed but a single restriction, we should hesitate long before we venture to add another. Such a restriction is, however, sought to be imported from provisions contained in the first article.

The provisions referred to are those which furnish the right to institute proceedings by attachment, in cases of attachments against non-residents. The property of a non-resident debtor may be attached when he is indebted on contracts made within this state, or to a creditor residing within this state, although upon a contract made elsewhere. (2 R. S. 8, § 1, sub. 2.)

After an application has been made for such an attachment, any other creditor may petition to become an attaching creditor; (2 R. S. 8, §§ 37, 38;) and, after certain proceedings, is to be deemed an attaching creditor. And by another provision, (2 R. S. 36, § 9,) creditors residing out of this state, and within the United States, may petition, and unite in any petition, in the same manner as resident creditors.

Now, for the purposes of the argument, it may be granted, that when the non-resident is not indebted on a contract made within this state, no creditor, residing out of the United States, can either originate or become a party to the attachment proceeding. Taking this, which is the position of the appellants, to be so, the question is, whether it affords an inference strong enough to control the language of the portion of the statute which relates to the duties of the trustees.

Until the appointment of trustees, the proceeding is the pri-

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vate, peculiar proceeding of the prosecuting creditor. He may settle with the debtor on such terms as he pleases, or he may discontinue merely because he chooses.

So, on the other hand, the non-resident may appear, and pay the prosecuting creditor, or give bond to answer his claim, and have the attachment discharged; and no creditor, who has neither attached nor applied to be deemed an attaching creditor, can interfere to prevent the discharge.

Two other sections of the act will aid us in arriving at a complete view of what I may call the whole legislative intent in the various provisions on the subject of the attachment proceedings. If the debtor die, or become insane, after the time limited for his appearance has expired, the proceedings are unaffected by his death: if he die, or become insane, before that time, the proceedings are stayed, and the property is to be delivered to his personal representatives, or to the committee of his estate. (2 R. S. 13, §§ 63, 64.)

The evil at which the whole statute is aimed was, that a debtor, while he had property within the state, was not liable to have it subjected to paying his debts while he was not within the reach of legal process, either by being non-resident, or concealed, or having absconded. The remedy devised was to constrain such a debtor to appear and answer to his creditors by attaching his property. If he yielded and appeared, then the end of the law was answered, and no further proceedings were requisite. If he did not appear, then the law took upon itself the administration of his property, substantially as if he were dead.

The section just referred to, giving the property to his personal representatives, and arresting the attachment proceedings, in case of the debtor's death, within the time limited for his appearance, strongly confirms this view. The whole act, so reviewed forms one consistent scheme; and the language of every part of it is allowed its full and natural force. The legislature might well refuse to interfere to produce this civil outlawry, except upon behalf of such creditors, or in respect to such claims as, in some sense, peculiarly demanded protection

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and enforcement at their hands, and they have accordingly limited the classes of persons and claims in behalf of which the proceeding can be commenced. But when commenced and carried on to the point at which the debtor's right to appear has ceased, they thought it more consonant with justice to administer the estate substantially as if the man were dead, than to give to particular prosecuting creditors the whole, or the prior benefit. Having adopted, in one class of administrations upon the estates of deceased persons, the general principle of equality among creditors, there is nothing strange or unreasonable to adopt substantially the same rules in other cases, where the necessity for administration arose from positive provisions of law, and not from natural causes.

I may, without impropriety, add, that the aims of the revisors, as expressed in their notes on this chapter, are entirely in harmony with those above expressed. (3 R. S., 2d ed., 612, &c., 816, note on § 61; 624, note on §§ 39, 40.) In this last note the revisors refer to the matter of *Depuyster*, (5 Cow. 266,) in which an application on behalf of foreign creditors was resisted; but neither court nor counsel objected to their claim on the ground that they were foreign creditors. Having their attention thus called to the practice under the old act, it seems impossible that they should have used the general term creditors without any qualification in speaking of distribution, if they had not intended to preserve the distinction that existed under the old act, according to which foreign creditors might share in the distribution, though they could not initiate the proceedings. That this was the rule appears from the case above cited, and from *ex parte Schroeder*, (6 Cow. 603.)

I have, therefore, come to the conclusion that every creditor, no matter where resident, has a right to exhibit his claim to the trustees, and, upon having it allowed, to share in the distribution.

The attachment was issued December 16, 1847; the non-resident debtors were declared bankrupt in England December 28, 1847, and were discharged May 27, 1848, from their debts in the bankruptcy proceeding. On the 9th of October, 1848,

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the trustees in the attachment proceeding were appointed, and on the 2d of December, 1848, the petitioners presented their claim to the trustees. The petitioners show that they were creditors at the time of the issuing of the attachment; that they have proved their debt in the bankruptcy proceedings, and have received a dividend. Upon these facts, the question is presented, whether these petitioners are not precluded from claiming as creditors under the attachment. That they were creditors when the attachment was issued is clear. The language of the section in respect to distribution is, that it is to be made among those who were creditors at the time of issuing the attachment. (2 R. S. p. 47, § 38, sub. 1.)

But this does not determine the question. It means to exclude those who become creditors afterwards, not to affirm that all those who were then creditors should receive dividends irrespective of the question whether they continued to be creditors or not. If this be not the construction, then even payment would not prevent the paid creditor from sharing in the fund. The language confirms the decision upon the old act in *the matter of Depuyster*, (5 Cow. 266,) where the point was raised whether one who had become a creditor after the issuing of the attachment could share in the fund.

In *Peck agt. Randall's trustees*, (1 Johns. 165,) the supreme court held, that the statute of limitations was a good bar to the claim of a creditor, which was not barred at the time of the issuing of the attachment, saying, that the trustees succeed to the rights of their principal, and consequently to his means of defence.

The question is then, I think, narrowed to this, whether the debt of Coates and Hilliard to their petitioners was extinguished by the discharge in bankruptcy. Debtors and creditors were all subjects of Great Britain, and domiciled in England; the debt was English in its origin, and the creditors have received their dividend under the English bankruptcy. Under such circumstances, I am not aware that it has ever been denied, that a discharge of the debt was valid, and to be respected in all other countries. (*Story Con. Laws*, §§ 387, 388.)

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No question is presented as to the effect of the foreign law upon property here, but simply whether the debt is extinguished between the parties.

It follows, that the petitioners were not entitled to participate in the fund in the hands of the trustees, and that the order of the general term should be reversed, and that of the special term affirmed.

SUPREME COURT.

BARBER and others agt. CASE.

Where a question of fact—(amount due from attorney to client, of moneys collected)—has been, by an order of the court, sent to a referee to pass upon, and on a motion for an amendment of the order, it appears that there are contradictory statements and suspicious circumstances attending the case, the court will direct that the parties and their witnesses be examined openly on oath before the court.

New-York Special Term, 1855.

ROOSEVELT, Justice. This, originally, was an application by the plaintiffs against their attorney, for an attachment to compel him to pay over moneys collected by him on the judgment in this cause.

Although the judgment was entered for \$228.77, including \$8.75 for costs, "it became" (such is the attorney's statement) "settled by compromise," for the sum of \$200—of which amount, he says, one Gibson, the plaintiffs' agent, "on the same day," (giving no date,) received \$130, leaving a balance of \$70, which he, the attorney, claims to retain for "other professional business," including "lengthy papers," and sundry "supplementary proceedings, in which many days was lost."

The judgment, it appears, was obtained on the 1st of June, and the satisfaction piece (signed by the attorney) on the 2d of

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July, 1852. And yet the attorney, as the plaintiffs allege, and he does not deny, long afterwards, informed them that an execution had been issued and returned unsatisfied, and that there was but "little hope of recovering anything, and that he had received nothing." He pretends, I am aware, that Barber, one of the plaintiffs, "shortly after the claim was settled," giving no date, "called at his office and was informed of the arrangement, and made no objection." But how can such an averment be reconciled with the admissions referred to, or with the letter sent by him more than two years subsequently, in which he said he had "delayed writing until he had *secured* their claim," and in which he informed them that it was "to be paid on the 20th day of September next"—that is, September, 1854?

Under these circumstances, instead of passing on the case definitively, the court sent it to a referee, to ascertain the amount due; and made a further order, that on filing his report, unless payment was made, an attachment issue against the attorney as for a contempt. He now applies to have the order "amended or settled, so as to comply with the facts or merits herein."

No alteration, it appears to me, is necessary, unless it be (as was done in the case of *Meyer agt. Lent*, 16 Barb. 588,) to direct the attendance of the attorney and his clients to be examined openly, on oath, before the court itself, with such witnesses, especially Gibson, as they may see fit to produce, to throw light on the seeming contradictions in which the written affidavits appear to be involved.

Let an order to that effect be entered, with \$10 costs of opposing the motion, to abide the event.

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SUPREME COURT.

CALVIN D. PARKHILL agt. JOSEPH N. HILLMAN and others,
Administrators of W. S. PARKHILL, deceased.

In an action in the supreme court, where a motion for costs against executors or administrators is made at a term of the court not held by the same judge before whom the trial was had, the certificate of the judge before whom the trial was had must be presented, showing what facts bearing on the question of costs appeared on the trial.

Whether, where the motion for costs is made at a term held by the same judge who presided on the trial, any certificate is necessary. *Quere?*

Otsego Special Term, March, 1856.

THIS action was tried at a circuit court held by Mr. Justice GRAY, when the plaintiff obtained a verdict for \$208, which was the full amount claimed by the plaintiff, of the estate represented by the defendants. The plaintiff, upon the pleadings and on affidavits, now moves for costs against the defendants, on the ground that payment of the claim on which the money was had was "unreasonably resisted or neglected" by the defendants. The defendants object to the court entertaining the motion, on the ground that no certificate of Mr. Justice GRAY has been obtained in reference to the facts that appeared on the trial. The plaintiff insists that his claim for costs rests on facts that did not appear on the trial, and that, as the supreme court is now organized, no certificate is necessary on a motion for costs against executors or administrators.

JAS. E. DEWEY, *for plaintiff.*
H. LATHROP, *for defendants.*

BALCOM, Justice. It is provided by statute, that no costs can be recovered in actions against executors or administrators, unless it appear that the demand on which the action was founded was presented within a specified time, and that its payment was unreasonably resisted or neglected, or that the

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defendant refused to refer the same; in which cases the court may direct such costs to be levied of the property of the defendants, or of the deceased, as shall be just, *having reference to the facts that appeared on the trial*. "If the action be brought in the supreme court, such facts shall be certified by the judge before whom the trial shall have been had." (2 R. S., p. 90, § 41.)

This statute was enacted under the constitution of 1821, when the circuit judges took no part in the decision of causes at either the general or special terms of the supreme court. The object of the certificate was to inform the supreme court on the motion for costs what facts appeared on the trial: for the court determined the question of costs with reference to the facts that appeared on the trial." (Gansevoort agt. Nelson, 6 Hill, 393.) This statute is expressly made applicable to questions of costs under the Code in actions against executors and administrators. (§ 317 of the Code.)

The certificate of the judge who presided on the trial was deemed the best evidence, under the old circuit system, of the facts that appeared on the trial; and neither the constitution of 1846, nor the Code, nor any other statute, has changed the rule, or rendered the certificate of the judge before whom the trial was had unnecessary, when the motion for costs is made at a term held by a judge who did not preside on the trial. The court must now, as before the constitution of 1846, in granting or refusing costs, "have reference to the facts that appeared on the trial." And such facts must still be certified by the judge before whom the trial is had. (2 R. S. 90, § 41.) There would, probably, be no necessity for a certificate, if the judge before whom the trial is had holds the court where the motion for costs is made—unless it be to inform the defendant in advance what facts, bearing upon the question of costs, the judge deems established at the trial. So he could avoid its effect by proof of other facts—as the certificate is not conclusive as to costs. (6 Hill, 389.) But it is not necessary to decide that question on this motion.

The conclusion to which I have arrived is, that I cannot

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grant or refuse costs to the plaintiff on this motion, because no certificate has been obtained of the judge before whom the trial was had as to the facts that appeared on the trial. The motion must, therefore, be denied, with \$10 costs, but without prejudice.

SUPREME COURT.

Lucius A. Foot agt. DANIEL T. SPRAGUE.

Now, a defence purely *equitable* in its character may be interposed to a cause of action strictly *legal*.

In many cases a defendant *must* avail himself of such a defence, if he would do so at all; for it is no longer allowable to bring an action, merely for the purpose of restraining the prosecution of another action, pending in the same court.

These principles *held* applicable to this case, (upon demurrer,) where it appeared that, instead of the plaintiff having a cause of action against the defendant for the possession of certain lands, the defendant had a cause of action against the plaintiff for his default in making previous payments for the land, whereby the defendant was unable to procure a good title, &c.

It seems, that the court will, in their *discretion*, where honesty appears, dig up, and shake from the rubbish, of a mass of commingled allegations and matters thrown into an answer without reference to form or comeliness, facts enough to make out a good defence.—REPORTER.

Albany General Term, Dec., 1854.

Present, WRIGHT, HARRIS and WATSON, Justices.

THIS was an appeal from an order made at special term, allowing a demurrer to the second answer of the defendant. The action was brought to recover possession of two hundred and seventeen acres of land in Legg's patent, in the town of Moriah, in the county of Essex.

The complaint stated that the plaintiff had the lawful title to the land; that the defendant was in possession, and unlawfully withheld the same, and claimed that he should be adjudged to

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surrender such possession. The allegations in the answer are sufficiently noticed in the opinion of the court. The plaintiff demurred for insufficiency. The demurrer was allowed, and from that order the defendant appealed. The appeal was ordered to be heard in the third judicial district, by reason of the inability of the judges in the fourth district to hear the same.

J. F. HAVENS, *for plaintiff.*

JOHN K. PORTER, *for defendant.*

By the court—HARRIS, Justice. It is difficult to ascertain, by the most diligent perusal of the answer in question, what was the precise line of defence which the pleader who prepared this answer had before his mind. A variety of facts are thrown promiscuously together, without much reference to the question whether they constitute one or several defences; or, indeed, whether they are material to any defence. The following facts, however, may be gleaned from the answer, and these, without reference to the various other matters with which the pleading abounds, constitute, as I think, a good ground for resisting the judgment which the plaintiff seeks to obtain against the defendant.

It is alleged by the defendant that, on the 2d of April, 1834, one James Green, who claimed to be the owner of the land in question, together with Myron S. Kemble, entered into a contract with one Curtis, by which they agreed to convey the land to Curtis, by good title, upon his paying them \$700, in seven annual payments, with interest; that, on the 2d of May, 1836, the plaintiff and one Stephens, who has since died, claimed that the interest of Curtis in this contract had been duly assigned to them, and thereupon another contract was entered into between the plaintiff and Stephens of the one part, and the defendant of the other part, whereby the plaintiff and Stephens agreed to sell the land to the defendant for the sum of \$2,000, to be paid in the manner specified, and to procure for the defendant a deed for the land from Green and Kemble, according to the terms of their contract with Curtis; that they also agreed

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to make the payments as they should become due on the contract between Green and Kemble and Curtis, so that there should be no default in the performance of that contract; that the only interest which the plaintiff and Stephens ever had in the land was that derived by the purchase of the interest of Curtis in the contract with Green and Kemble; that the defendant had paid to the plaintiff and Stephens, upon the contract with them, the sum of \$1,205.73, and that they had never made any payments upon the contract with Green and Kemble, although the payments had long since become due, and that by reason of such default the contract had become inoperative and void; that the interest of Green had since been sold under a judgment against him, and title perfected in the purchaser; that in 1842, or 1843, Green was discharged under the act of bankruptcy passed in 1841, and any interest which he had in the land passed to his assignee; and that, in fact, Green never had any title to the land, but that it belonged to one Brown; that Stephens died insolvent, and the plaintiff is unable to pay his debts. It is further stated that, relying upon the representations of the plaintiff and Stephens that Green had a good and sufficient title to the land, and their engagement to make the payments on the contract with Curtis, as they became due, the defendant entered into his contract with them, and made his payments thereon, and expended nearly \$1,000 in improvements upon the land.

It needs but to present such a state of facts as this to show that this action ought not to be sustained. It is the plaintiff, and not the defendant, who is in default. It is the defendant who has a cause of action against the plaintiff, and not the plaintiff against the defendant.

Assuming the statements in the answer to be true, as we do upon demurrer, it is established that the plaintiff has no interest in the land, legal or equitable; that having induced the defendant to believe that, through him and Stephens, he could obtain a good title, he received over \$1,200 on account of the price of the land, and now, without refunding the money, and without the ability to give a title upon the performance of the

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agreement on the part of the defendant, and without making compensation for the improvements which the defendant has made upon the land, he seeks to drive him from the possession.

Such a state of facts might not have been available as a defence to an action of ejectment at common law. But, I apprehend, a court of equity, upon a bill containing this statement, would not have hesitated to restrain the prosecution of such an action, until the plaintiff should at least refund the purchase money he had received, and, perhaps, make compensation for the improvements made upon the land by the defendant. If so, it is now a good ground of defence. It is no longer necessary to bring a suit in equity to restrain inequitable proceedings at law. A defence, purely equitable in its character, may be interposed to a cause of action strictly legal. Indeed, the defendant *must* avail himself of such a defence in this way, if he would do so at all; for it is no longer allowable to bring an action merely for the purpose of restraining the prosecution of another action pending in the same court. (*See Van Zantvoord's Pleadings, 2d ed., 505, and cases there cited.*)

I have not thought it worth while to notice the allegations in the answer in respect to the suit by Brown and others, against the defendant, to recover the same premises; or the suit brought by Brown, at an earlier day, against Curtis and the other occupants of the Legg patent; or the suit by Shaw against Spear; or the stipulations between the parties to these suits. It is by the inartificial commingling of these various matters, with those to which I have already referred, that the pleader has been able so effectually to obscure the grounds of his defence as to induce the court, at the special term, to think the answer contained no defence at all. Without inquiring whether these various matters, which seem to have been thrown into the pleading at a venture, contain in them the elements of a defence, I am of opinion that the facts to which I have already referred constitute an equitable defence to the plaintiff's claim to recover the possession of the premises.

The order allowing the demurrer should, therefore, be reversed, and the demurrer overruled, with costs.

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NEW-YORK COMMON PLEAS.

HECTOR COURTOIS agt. L. F. HARRISON, TREASURER OF THE
YOUNG MEN'S DEMOCRATIC UNION CLUB.

In proceedings supplementary to execution under § 294 of the Code, which does not limit the remedy to any county in which the debtor resides, and which requires no such jurisdictional fact to be shown, as required by § 292, there is no difficulty in complying with all the requisites of § 294, against a *corporation or joint stock association*, as well as against individuals. (*See Sherwood agt. Buffalo & N. Y. City Railroad Co., ante, page 136.*)

Where judgment is recovered against a joint stock association, in the name of its treasurer, the treasurer individually, nor none of the other individual members of the association, can be proceeded against, under § 294, as defendants. But any one of them, who holds the property of the association, may be examined as to such property, whether named as an officer or not. The object is to ascertain the property of the association, and the examination should be confined to that limit.

General Term, April, 1856.

A JUDGMENT was recovered in the marine court against the defendant as treasurer of the Young Men's Democratic Union Club, under the provisions of the statute allowing actions to be brought against the officers of joint stock associations. (*Sess. Laws of 1849, Chap. 258.*)

Supplementary proceedings were taken to examine a person having property of the judgment-debtor in his possession, under § 294 of the Code. Upon the return of the order, the judge before whom the order was returnable, discharged the order upon the ground that such proceedings could not be taken in an action against a corporation or joint stock association. The plaintiff appealed therefrom to the general term.

L. C. PIGNOLET, *for plaintiff.*

S. W. CONE, *for defendant.*

INGRAHAM, F. J. The plaintiff recovered against the defendants a judgment in the marine court under the statute of

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1849, (*chap.* 258,) and filed a transcript with the county clerk. After issuing an execution, he commenced supplementary proceedings to enforce the payment thereof.

The order obtained was against L. F. Harrison, as a person having property in his possession of the judgment-debtors exceeding in value \$10. On the return of the order, the judge at chambers, on defendants' motion discharged it, from which the plaintiff appeals.

There is no force in the objection, that the judge could not, on the papers, discharge the order. These orders are granted *ex parte*, and the first opportunity the defendant has to be heard is on the return of the order. If the affidavit, on which the order was granted, was insufficient, or for any cause the order was improvidently made, the judge ought to vacate it; and it is the right of the defendant to have such motion, under such circumstances, granted.

There may be some doubt whether the Young Men's Democratic Club is a joint stock company, or association, within the meaning of the statute. It can hardly be contended that every political association or committee is to be considered a joint stock association. But whether it is so or not, it is too late for the defendants in this proceeding to raise the objection. It should have been done on the trial, and if overruled there, the defendants should have appealed. Not having done so, the judgment on this proceeding is conclusive against them.

It is said, however, that the judge did so decide, and ordered judgment against the defendant Harrison, individually, and affidavits, with the judge's certificate to that effect, are submitted. The judge rightly disregarded these papers. If the judgment was erroneously entered up in the marine court, we cannot go behind that judgment and correct errors, which can only be done by that court. The defendant must apply to the marine court for relief.

The only question, therefore, that is of any importance on this appeal is, whether this proceeding can be resorted to upon a judgment recovered against a joint stock association under the statute of 1849.

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It is settled, that if the judgment was against the corporation the remedy by supplementary proceedings is improper, and that the plaintiff should resort to the remedy provided by the Revised Statutes. (*Hinds agt. The Canandaigua & Niagara Falls Railroad Co.*, 10 How. Pr. R. 487.)

The judgment in this case is not against any individuals. It is against the club only, as a joint stock association. The members of that club are not defendants, any more than stockholders in a corporation are defendants when the action is brought against the corporation. They are not personally liable, nor can their individual property be reached by such a judgment. If it were otherwise, it would be a very unnecessary provision in the act to reserve to the plaintiff the right to proceed against the individual members, as is prescribed in the fourth section.

The insertion of the name of Treasurer, as defendant, does not make him in any way responsible, but merely provides for commencing the action in the same way as the free banking statute directs, that actions may be commenced against the president of the institution as such. In neither case does any personal liability attach to the individual.

The order granted on this proceeding is under the 294th section of the Code. That section does not limit the remedy to any county in which the debtor resides; nor is it required that it should appear in the affidavit that the execution has been issued to the sheriff of such county. Such has been the construction given to this section in the *People agt. Norton.* (4 Sand. S. C. R. 640.)

The reasons assigned by the court why proceedings cannot be taken under § 292 against a corporation, have no application to § 294. The judge says, that § 292 "provides for the order when the execution has been issued to the county where the debtor resides, &c. This evidently refers to a judgment against a natural person, who has or is capable of having a residence, &c." "A corporation, being a mere artificial being, can have no residence, and this jurisdictional fact can never be shown in the case of an execution against such a defendant."

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In § 294 no such jurisdictional fact is necessary, and there is no difficulty in complying with all the requisites of that section against a corporation or joint stock association, as well as against individuals. The case is a stronger one also against joint stock associations, because the provisions of the Revised Statutes, as to the sequestration of the property, do not apply to any other bodies than corporations; and if this section is held to be inapplicable to such associations, there is no means of enforcing the payment of such judgment, except by execution.

It is said that Harrison, against whom the order was made, is a defendant, and therefore not subject to such an examination. I have already remarked that the individual members are not defendants, and cannot be proceeded against as such. Any one of them, who holds the property of the association, may, I think, be examined, whether named as an officer or not. The object is to ascertain the property of the association, not of Harrison, and the examination should be confined to that limit.

I think the order appealed from should be reversed, and the witness be required to submit to an examination.

As the question is new, no costs should be allowed on this appeal.

Order reversed, and Harrison ordered to submit to an examination.

Pollock agt. Cronise.

SUPREME COURT.

JAMES POLLOCK agt. HENRY CRONISE.

An absolute grant and conveyance of land, carries with it to the grantee the right to the rents payable under a previous agreement, for an *easement* upon the premises, (the privilege of damming and flowing water over a portion of the premises for mill purposes,) made by the grantor with a third person. And this is so, notwithstanding an exception or reservation in the deed as follows: "Excepting and reserving the right to flow the land above described, as the same was granted and conveyed by the party of the first part to Henry Cronise, and as the same is now used and occupied by the said Henry Cronise." This provision is not valid either as an *exception* or *reservation*; the most that can be made of it is, to show that the grantee took the title subject to the easement made under the previous agreement. It by no means enabled the grantor to collect and receive the rents for the easement as his own.

Wayne Circuit, April, 1853.

Before WELLES, Justice. Trial by the court—jury waived by the parties.

The following facts were established on the trial:—

On the 3d day of January, 1839, the plaintiff and the defendant entered into and executed, under their respective hands and seals, an agreement or instrument in writing, by which the plaintiff, in consideration of ten dollars to him in hand paid by the defendant, and also in consideration of the yearly rents and sums of money, covenants, conditions and agreements therein-after mentioned, reserved and contained to be paid, kept, done and performed by the defendant, his heirs and assigns, did, for himself, his heirs and assigns, *lease* and *grant* unto the defendant, and to his heirs and assigns, forever, (subject nevertheless to the terms and conditions therein contained,) the full right and privilege of keeping up and maintaining, at all times, his [then] present saw-mill dam, or any other dam or dams which might be built where the [then] present one was, to the height of the [then] present dam, [and no higher,] which said dam was situate on lot number twenty-eight, [north of mud-creek,]

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in township number twelve, in the first range of townships in the town of Arcadia, in the county of Wayne, and was built across Flat Brook, as it was called, on what was called the Batty farm; and the full right and privilege of keeping the water in the pond raised by the said dam to the same height the [then] present dam raised it, and of backing up and overflowing with water, the land of the said plaintiff, situate above the dam, to the same height and extent, and in the same manner as the [then] present dam did, and not otherwise, upon the payment of the annual rents or sums of money, and the performance of the covenants and conditions thereafter mentioned and contained, &c.

And by the said agreement, or instrument in writing, the defendant covenanted and agreed with the plaintiff, that he, the said defendant, his heirs and assigns, would pay annually, each and every year thereafter, so long as the said agreement should remain in force, unto the plaintiff, his heirs and assigns, the yearly rent or sum of forty dollars for each year during the term of two years from the date of said agreement, and after that the sum of twenty-five dollars per year so long as said agreement should remain in force, in the manner thereafter mentioned, which was provided in said agreement to be paid in sawing lumber at the rate of 31 1-4 cents per one hundred feet, the timber for sawing to be delivered at said saw-mill by the plaintiff, &c.

And it was in and by the said agreement mutually covenanted by the said parties, that the same, and everything therein contained, should be and continue in full force, operation and effect, and be obligatory on both of them, and upon their heirs and assigns respectively, until the defendant, or his heirs or assigns, should have taken away and removed the said mill-dam, so as to lower and reduce the waters in said Flat Brook to the ordinary and common level thereof, as they were before the erection of the said dam, and should have given to the said plaintiff, or to his heirs or assigns, notice thereof in writing, stating and declaring that the said mill-dam would not be rebuilt, and thereby releasing all right, title, claim and demand whatsoever

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under or by virtue of the said agreement or instrument in writing, or any of the covenants or agreements therin contained, to be executed and acknowledged in such manner as to entitle the same to be recorded; and that thereupon and thenceforth the said agreement, or instrument in writing, and all covenants and agreements therein contained, should determine and cease.

On the 26th day of February, 1847, the plaintiff sold, to one Alfred Harris, his farm, which lay adjoining the farm of the defendant, upon which the said saw-mill and dam were situated, and over and through which farm of the plaintiff the said Flat Brook run, to and upon and over the said farm of the defendant, and which said farm, so sold by the plaintiff to said Alfred Harris, embraced the land overflowed by the said dam; and on the same day the said plaintiff and his wife duly executed and delivered to the said Harris a deed for the same, with covenants of seizin, against incumbrances and for quiet enjoyment. The said deed, immediately after the description of the premises conveyed, contains the following clause:

"Excepting and reserving the right to flow the land above described, as the same was granted and conveyed by the party of the first part to Henry Cronise, and as the same is now used and occupied by the said Henry Cronise."

The defendant had paid to the plaintiff the rent reserved in the agreement of January 3d, 1839, up to February 26th, 1847, the date of the deed from the plaintiff and wife to Harris, and refused to pay any rent to the plaintiff accruing after that time.

The action is brought to recover the rent accruing between the date last mentioned and the commencement of the action.

Upon the foregoing facts, the action was submitted.

O. H. PALMER, *for plaintiff.*

LYMAN SHERWOOD, *for defendant.*

WELLES, Justice. The effect of the conveyance by the plaintiff to Harris, was to vest in the latter the right to the rents in question. The provision in that conveyance, respecting the defendant's right to flow the land, is not valid either

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as an exception or reservation. The utmost effect that can be given to it is to limit the description of the property intended to be conveyed; or to show that Harris took the title subject to the easement of the defendant, acquired by the instrument of January 8d, 1839, and thus to qualify the covenants in the deed.

It would be torturing language to interpret the clause in question as a reservation of the rent. It is the right to flow water upon the land conveyed which is attempted to be excepted or reserved, and not the rent. If the *rent* had been reserved, a very different question would have been presented. It is not good as an exception, because the plaintiff had no right to grant it, having previously parted with it by the agreement with the defendant, of the last-mentioned date.

In the *Touchstone* it is said that, "In every good exception these things must concur." Seven particulars are then specified, the fifth of which is as follows: "It must be of such a thing as he that doth except may have, and doth properly belong to him." (1 *Shepp. Touch.*, Chap. 5, pp. 77, 78; see also *Cruise on Real Property*, Tit. XXXII, Ch. XX., § 66, Vol. 4, p. 289.)

Neither is it good as a reservation, for the reasons that the thing reserved is not something growing or issuing out of the thing granted in the same deed; but had been previously granted by the agreement with the defendant referred to; and also, that the right reserved is to a stranger.

The *Touchstone* says, "In every good reservation these things must always concur: 1. It must be by apt words. 2. It must be of some other thing, issuing or coming out of the thing granted, and not a part of the thing itself, nor of something issuing out of another thing. 3. It must be of such a thing, whereunto the grantor may have resort to distrain. 4. It must be made to one of the grantors, and not to a stranger to the deed." (1 *Shepp. Touch.*, ch. 5, p. 80.)

In *Hornbeck agt. Westbrook*, (9 *Johns. R.* 73,) it was held, that a reservation in a deed, to a person not a party to the

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deed, was void. (*See, also, Cunningham agt. Knight, 1 Barb. S. C. R. 407.*)

It follows, that the plaintiff, having granted the right to the rents in question, is not entitled to recover them, and that there should be judgment for the defendant.

HERKIMER COUNTY COURT.

EDWARD G. CHAPIN, appellant, agt. BENJAMIN P. CHURCHILL, respondent.

A confession of judgment before a justice of the peace who is father-in-law to the plaintiff, is illegal on the ground of *relationship*.

And the plaintiff may (where the defendant will not consent to do anything about it) bring an appeal to the county court, and have the judgment *reversed for error in fact*.

But the county court has no right to reverse the judgment *without costs to either party*, because, the Code (§ 368) provides that, if the judgment be reversed, "costs shall be awarded to the appellant."

Where, however, such a judgment is reversed, without costs to either party, the *clerk*, where the judgment is docketed, has no power nor authority to enter the judgment of reversal *with costs*. He should follow the decision of the court.

Although it is an irregularity for the clerk to insert in the judgment the amount of costs adjusted, *without notice*, where the opposite party has appeared, yet the mode of correcting the irregularity is in the *discretion* of the court, and should depend on the circumstances of the case. If proper items are allowed and inserted in good faith, the costs should be allowed to stand—if bad faith appears, the costs should be stricken out; and if improper items only are inserted, there should be a re-adjustment, at the expense of the party for whom they were inserted. The proper practice, however, in all such cases, is to give notice.

Herkimer, Feb. 5, 1856.

THE defendant, on the 23d day of July, 1855, confessed a judgment to the plaintiff, before JOHN UHLE, Esq., a justice of the peace, who was the father-in-law of the plaintiff, for \$19.53; and judgment was entered by said justice against the defendant for \$20.78, damages and costs.

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After the said judgment was so confessed and entered, the plaintiff learned that the same was void and illegal on account of his relationship to the said justice ; and then, failing in his efforts to have the judgment paid or arranged in any other effectual way, he brought an appeal to the county court of this county, founded on error in fact—to wit, the relationship between the plaintiff and the justice.

The appeal was brought to argument at the December term of this court, and this court, Hon. E. GRAVES, county judge, presiding, reversed the said judgment of the justice for the said error, but *without costs to either party*.

Afterwards, in December, the attorney for the appellant caused a judgment of reversal to be entered in the clerk's office of Herkimer county, *with twenty dollars and some cents costs against the respondent*. The said judgment was so entered, and the costs adjusted and inserted therein *without any notice to the respondent's attorney*.

A motion is now made, on behalf of the respondent, to set aside the adjustment of the costs, and to strike out of the said judgment the amount of costs therein contained.

GEO. A. HARDIN, *for appellant*.

L. J. YOUNG, *for respondent*.

EARL, County Judge. (1.) The court having ordered a judgment of reversal without costs to either party, could the appellant enter a judgment of reversal with costs?

The court had no right to reverse the judgment *without costs to either party*. The Code (§ 368) provides, that if the judgment be reversed, "costs shall be awarded to the appellant." This section is so plain that it needs no adjudication to interpret or expound it. But it has been decided that the reversal must be *with costs*. (*See Logue agt. Gillick, 1 Smith, 898; Hahn agt. Van Doren, 1 id. 411; Main agt. Eagle, id. 621.*)

But although the court erred in reversing without costs, the clerk had no right to correct the error, or to disregard the decision of the court in the entry of judgment. . He is a mere clerical

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officer of the court, and has no right, in any case, to reverse, modify, or review the decision of the court. If the court should, in any case on appeal, strike out a portion of the damages recovered by a party below, although there was clearly no error in the judgment appealed from, the clerk could not insert, in the judgment entered by him, the damages so stricken out.

Section 279 of the Code provides, that "the clerk shall keep, among the records of the court, a book for the entry of judgments, to be called the judgment book;" and § 280 provides that "the judgment shall be entered in the judgment book, and shall specify clearly the relief granted, or other determination of the action." According to this last section, the clerk, in the entry of judgment, should follow the decision or determination of the court.

The relief granted in this case, or more properly, the determination of the action, was a reversal of the judgment without costs, and the clerk should have entered the judgment accordingly, and had no right to enter a judgment of reversal with costs.

(2.) Could the clerk properly insert the costs, in the entry of judgment, without notice to the other party?

All the cases agree that it is an irregularity; but as to the effect of the irregularity the cases differ. Justice BARCULO, in *Mitchell* agt. *Hall*, (7 *Howard*, 490,) held, that the adjustment of costs, and all subsequent proceedings, should be set aside. Justice GRIDLEY, in *Dix* agt. *Palmer*, (5 *Howard*, 233,) held, that the taxation of the costs would be set aside, unless they were retaxed on due notice, but that the regularity of the judgment would not be affected. Justice DEAN, in *Van Wyck* agt. *Reid*, (10 *Howard*, 366,) granted a motion to strike out the costs entered in the judgment, and ordered a re-adjustment. Justice HARRIS held, in *Potter* agt. *Smith*, (9 *Howard*, 263,) that "although it is irregular for the clerk to insert, in the entry of judgment, the plaintiff's costs without notice of taxation when the defendant has appeared, yet that will not affect the entry of judgment, if notice of re-taxation be given and the entry of

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judgment corrected, if any correction is necessary, in conformity to such re-taxation." In *Stimson agt. Huggins*, (16 *Barbour*, 658,) it is held, "that the omission of the notice does not affect the regularity of the judgment; and that the only consequence of such omission will be, that the court will order a re-adjustment of the costs at the expense of the party omitting to give the notice, and to compel such party to pay the costs of a motion to obtain a re-adjustment."

Hence, it will be seen that the decisions differ somewhat; but they all agree that the insertion of the costs in the judgment without the notice is an irregularity. I think that the mode of correcting such an irregularity is very much in the discretion of the court, and should depend on the circumstances of each case. If the costs inserted in the judgment without notice are all right and proper, and if they were so inserted in good faith, and not for the purpose of obtaining any improper or undue advantage over the other party, the court should not, on motion, strike them out. But if the costs are thus inserted, and execution is issued for the purpose of oppressing the other party, and making him costs, the court should strike them out, and set aside the execution; or if it is alleged that the bill of costs adjusted contains improper items, the court should compel a re-adjustment at the expense of the party. The proper practice is to give the notice; and if it is omitted, as it sometimes is, in order to perfect a judgment immediately after it is due, so as to secure it, notice of re-taxation should be given.

In this case, as there is no allegation that any improper items were inserted in the bill of costs, or that the respondent was otherwise aggrieved by the adjustment without notice, I think the motion should not be granted for this irregularity.

But, for the reasons first stated, I think the motion should be granted. I therefore decide that an order be entered in the clerk's office of Herkimer county, directing the clerk to strike out of the judgment entered in this action the costs inserted therein, and to conform the said judgment to the decision of the court; and that the appellant pay to the respondent five dollars costs of this motion.

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SUPREME COURT.

THE CLYDE & ROSE PLANKROAD COMPANY agt. BENJAMIN
BAKER.

In an action prosecuted before a justice of the peace, where a plea of *title* is interposed, and proceedings are had for continuing the prosecution in the county court, it is not necessary, in order to give the county court *jurisdiction*, that it should appear that the defendant was a *resident of the county*, when the action was commenced. The justice had acquired jurisdiction of his person, and that, with the proceedings before him, was sufficient to give the county court jurisdiction.

It is very much doubted whether, in a cause originating in a justice's court, continued by a plea of title in the county court, and then transferred to this court, it is the duty of the court, after a trial is moved on, to entertain any inquiry into the question of the jurisdiction of the county court over the person of the defendant, *provided* enough appears to show that such jurisdiction *may* exist, which may be by the opening statements of counsel, as well as by a copy of the summons and proceedings before the justice.

If it were necessary that the facts, which gave the county court jurisdiction, should be made to appear by the copy pleadings, and proceedings before the justice, the court should allow them to be annexed to the pleadings in the county court.

Cayuga Special Term, Nov., 1854.

MOTION to set aside nonsuit, and for a new trial, on bill of exceptions.

The action was commenced by summons and complaint in the county court of Wayne county. The complaint in that court set forth that the plaintiffs were, and, since on or about the 7th day of April, 1848, had been an incorporated company, duly organized pursuant to the provisions of an act of the legislature of the state of New-York, entitled, "An Act to Provide for the Incorporation of Companies to Construct Plank-roads, and of Companies to Construct Turnpike Roads," passed May 7th, 1847, and the acts amending the same. That as such corporation they were, and, since on or about the 16th day of August, 1848, have been the owners, and in the possession,

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use and occupation of a plankroad track, situate and extending from the village of Clyde, in the county of Wayne, through parts of the towns of Galen and Rose, to the village of Rose Valley in said county, and being about four rods wide and about four miles and three hundred and ten rods long. The complaint also states the filing, on the day and year aforesaid, of the proper certificate of the plank inspectors of said county, in relation to said plankroad. That, upon filing such certificate, the plaintiffs erected two tollgates and gate-houses on and across said road—the one known as the south gate, near the village of Clyde, and the other known as the north gate, near the village of Rose Valley—for the uses of the plaintiffs for collecting toll from persons travelling on said road.

That afterwards, the defendant, well knowing the premises, travelled on said plankroad, and passed through said gates, at divers days and times within the last two years, with divers teams, horses, cattle, carriages and other vehicles, drawn by said animals, upon which he was liable, and from time to time promised to pay toll at said gates, according to the rates prescribed by statute, to the aggregate amount of \$20, for which sum the plaintiffs demanded judgment, with interest and costs.

There was no allegation or statement in the complaint, showing, or by which it appeared, that the defendant was a resident of the county of Wayne.

The answer denied specifically various allegations of the complaint; and, among other things, denied that the plaintiffs had any right or title to the place or ground where the track of their road and gates were. It also averred that the track of the supposed plankroad was a public highway, and the possession and right to the use of the same were in the commissioners of highways and the people of the town of Galen, and not in the plaintiffs.

The county judge of Wayne county certified that he had been consulted by and acted as counsel for the plaintiffs in the action, in regard to the matters in question therein, and ordered the action transferred to the supreme court, pursuant to the provisions of § 31 of chapter 470 of the laws of 1847. His

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certificate was dated Feb. 28, 1854. The action came on to be tried at a circuit court held in and for the county of Wayne in April, 1854.

The counsel for the plaintiffs, in opening the case to the jury, stated, among other things, that the action was originally commenced before a justice of the peace of Wayne county; that, on the return-day of the summons, the parties appeared before the justice, and the plaintiffs put in their complaint, to which the defendant put in an answer, showing that title to land would come in question on the trial, and gave the undertaking required by § 56 of the Code of Procedure, and thereupon the action before the justice was discontinued, and this action for the same cause commenced in the county court, by deposit of the foregoing summons and complaint with the justice, pursuant to § 60 of the Code, to which complaint the defendant had put in the foregoing answer, being the same defence he had put in before the justice.

Whereupon the defendant's counsel objected to any further proceedings in the action in this court, on the ground that the substance of the facts above stated in the opening did not appear upon the summons or complaint by which this action was commenced in the county court; and that it did not appear by the said summons and complaint that the county court had jurisdiction of the cause of action, or of the person of the defendant. The said justice sustained the objection, to which decision of the court the plaintiff's counsel excepted.

The plaintiffs then offered to produce the proceedings and pleadings in the action before the justice, and annex them to the pleadings, which was objected to by the defendant, on the ground that the court, having no jurisdiction of the action, could not take or permit any step or proceeding therein, &c., and the court sustained the objection, and the plaintiff's counsel excepted.

The plaintiffs then offered to prove the fact that the defendant was a resident of the county of Wayne, to which the defendant objected on the same grounds last stated, and the court sustained the objection, and the plaintiff's counsel excepted.

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The plaintiffs then asked leave of the court to amend their summons and complaint, by inserting suggestions to the effect that this action was originally commenced in a justice's court, &c., as stated in the opening of the counsel. To which offer defendant objected on the grounds,

1. That the court, having no jurisdiction of the action, could not take or permit any step or proceeding therein.

2. That the court could not acquire jurisdiction by making a new record, which would form an issue in an action which then had no existence in this court.

The court sustained the objection, and the plaintiff's counsel excepted.

The plaintiffs then applied to the court for leave to amend the summons and complaint, by inserting therein allegations to the effect that the defendant was a resident of the county of Wayne, to which the defendant objected on the same grounds last stated. The court sustained the objection, and the plaintiff's counsel excepted.

The court then nonsuited the plaintiff, to which the plaintiff's counsel excepted.

A motion is now made, on the part of the plaintiffs, to set aside the nonsuit, and for a new trial.

C. D. LAWTON, *for plaintiffs.*

S. A. GOODWIN, *for defendant.*

WELLES, Justice. Under the facts stated by the plaintiffs' counsel in his opening, and which were offered to be proved, the jurisdiction of the county court did not depend upon the residence of the defendant, nor whether such residence was in the county of Wayne. That fact would be important, on the question of jurisdiction, only in a case where the action was originally commenced in the county court.

If it was necessary in this case that the complaint or summons, or any of the pleadings, should show the defendant to have been a resident of the county of Wayne at the time of the commencement of the action in the county

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court, under § 60 of the Code, the same would be equally necessary in all cases brought into that court, in pursuance of that and the next five preceding sections:—and it would follow that an answer, in an action before a justice of the peace by a defendant, who was not a resident of the same county with the justice, showing that the title to real property would come in question, accompanied by the proper undertaking, would oust the justice of jurisdiction, without giving the plaintiff the right to continue the prosecution in the county court, or affording him any other remedy, excepting to bring his action in the first instance in the supreme court, or some county court, without reference to the amount of his claim, or of suing before a justice in the county where the defendant resided; and the consequence would be the same if the expression, “time of its commencement,” in the first subdivision of § 30, is to be understood as referring to the time of the commencement of the action *in the county court*; because the defendant might remove from one county to another after the discontinuance before the justice, and before the action was commenced in the county court; to do which, the act allows the plaintiff thirty days.

It follows that it was entirely immaterial where the defendant resided. The justice had acquired jurisdiction of his person, and *that*, with the proceedings which ensued before him, was all that was necessary to give the county court jurisdiction. The only consideration which has occurred to me, as presenting any difficulty in the way of the plaintiffs proceeding with the trial at the circuit is, that the copy of the summons and pleadings, which is supposed to guide the court in regard to the issues to be tried, do not show that the county court had jurisdiction of the parties. But this, as I shall attempt to show was not indispensable. I doubt very much whether it is the duty of the court, after the trial is moved on, to entertain an inquiry into the question of its jurisdiction over the person of the defendant, provided enough appears to show that such jurisdiction *may* exist, which was the case here, provided the counsel's opening statement was true.

There is no statute, or rule of practice, requiring the facts

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stated to be in writing, or to be incorporated in the copy pleadings. Some practitioners have pursued the course of introducing them into the declaration in cases before the Code, in the form of a suggestion; but it never was held to be an issuable averment. (*Tuthill agt. Clark*, 11 *Wend.* 642.) What the practice has been under the Code, I am not advised. I do not think it was necessary, either before or since the Code was enacted. I think the circuit court should have suffered the trial to proceed, and the prevailing party could have made the facts in question a part of the judgment-roll by attaching thereto the proceedings before the justice, including a copy of the undertaking, with such suggestions as were necessary to show their application. (*Code*, § 281, 2d sub.) I see no more objection to this, than in annexing to the judgment-roll the order of the county judge, by which the supreme court acquired its jurisdiction in this case—which would be indispensable to show a good and valid judgment by the judgment-roll. Any untrue or unwarrantable suggestion which a party might cause to be attached, would, on motion, be ordered to be detached from the roll.

In this case, the plaintiffs offered to produce the pleadings and proceedings before the justice, and annex them to the pleadings. The court refused to allow this to be done. What more could properly have been required of the plaintiffs, I am at a loss to conceive.

I have shown, I think, that it was unnecessary to show, in any way, that the defendant was a resident of the county of Wayne: and if the facts which gave the county court jurisdiction should be made to appear by the copy pleadings, or by papers or proceedings in conjunction with them, I know of no more appropriate way than that which was offered to be pursued.

For these reasons, I think, a new trial should be granted—with costs to abide the event.

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SUPREME COURT.

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An *appeal* from one court to another lies only from the branch of review or last resort of the inferior court, if it have a branch of review.

The judicial action of the inferior court must be exhausted before resort by appeal to an appellate court. This results from the general principles governing the relations of courts of original and appellate jurisdiction, in the absence of statutory regulation on the subject.

Accordingly, an appeal from the marine court of the city of New-York to the common pleas, lies only from the decision or judgment of that court at general term—the court in that department exercising powers of review over decisions in its other departments.

New-York Special Term, March, 1856.

In this case a judgment was entered in the marine court by order of a single justice in favor of the plaintiff. From that judgment an appeal was taken directly to the common pleas at general term.

The plaintiff, denying the jurisdiction of the common pleas to entertain an appeal, refused to appear in that court.

After the appeal to the common pleas was made, the plaintiff in the marine court applied to the justices and clerk of that court for an execution on his judgment in that court, on the ground that the appeal, being unauthorized by law, was of no effect, and the judgment of the marine court was still in force.

The marine court refused to issue the execution, and the plaintiff now applies to this court for a *mandamus*, directing them to issue it.

RICHARD BUSTEED, *for plaintiff.*

CHARLES E. BIRDSALL & GEO. SHEA, *for defendant.*

PEABODY, Justice. The claim on the part of the plaintiff is—

1. That no appeal lies from the marine court to the common pleas; and,

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2. That if an appeal does lie at all, it lies only from the general term, composed of the three justices, on a judgment entered by order of the court thus organized.

Either of these propositions being decided in favor of the plaintiff, he is entitled to the relief he asks. The last proposition is urged on the ground that the court below, having a branch to which appeals from the judgment of a single justice may be taken for review, the defendant is bound, on general principles, to carry his case to that branch, before applying to a court of superior jurisdiction.

In *The People ex rel. Figaniere agt. The Justices of the Marine Court*, (2 Abbott, 126.) the general term of this court, on a motion for a *mandamus*, to compel the general term of the marine court to vacate its judgment, on the ground that no appeal lay from the decision of a single justice of that court to its general term, denied the motion, and decided that such an appeal did lie. This case decides that an appeal from a judgment, by order of a single justice, does lie to the general term of that court in a case like that; and if it lies in one case, it almost necessarily lies in all. The court, in the opinion given, say—“We think that an appeal lies to the general term from any and all judgments entered in that court by a single judge, and that whether the cause was tried with or without a jury. This power is given by the laws of 1853, § 5, chapter 617.”

It only remains for us to inquire whether an appeal lies also to the common pleas directly from the same class of judgments. If it does, the party appealing is at liberty to appeal either to the general term of the marine court, or to the general term of the common pleas, or perhaps to both at his pleasure. This condition of the law is not to be presumed, and only to be admitted, if expressly ordained by the statute.

Prior to the statute of 1853, appeal from this class of judgments did lie to the general term of the common pleas *directly*, but the marine court, prior to that statute, had no general term, and no power to review its judgments. That statute created the general term, and conferred on it powers of review in cases like the present. It did this without expressly repealing the

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statute under which the common pleas had previously entertained these appeals, or altering by express terms the powers of the common pleas in that respect; for no reference is made in the act to that court, or to the course of practice then existing. The appellate powers of the court of common pleas were then general, and applicable to all cases of judgment in the marine court. The first judgment in a cause in that court then, was the only one it could render, and from this judgment the appeal to the common pleas was necessarily made *directly*; but that statute gave the marine court powers of review, and the question is, what effect had this endowment of the marine court on the powers of the common pleas—or had it any? May that court still entertain appeals directly from a judgment of a single justice of the marine court, as it did when the latter court had no power to review it, and such a judgment was the last and only one the court could render? Or must an appeal from such a judgment now be taken first to the general term of that court, and the jurisdiction of the court in which the case originated be exhausted before the aid of the appellate court can be availed of?

An appeal from one court to another, ordinarily, and in the absence of express provision to the contrary, lies only from the ultimate judgment or decision of the inferior court. This principle is recognized and approved by the court of appeals in *Gracie agt. Freeland*, (1 *Const.* 228,) and it is certainly quite in harmony with our impressions of the relation of courts of original and appellate jurisdiction.

While the court of original jurisdiction has powers of review and relief, which have not been invoked, application to a higher court for relief seems unnecessary, and not in harmony with the theory on which the appellate court is constituted and supposed to act. Resort to a higher court is provided for, and can only be expedient after the powers of the inferior court have been fully applied and exhausted, and when, from the constitution and organization of that court, no further appeal or review, or more grave deliberation and judgment can be had therein. While, however, the branch or department of that court con-

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stituted for review of its doings in other departments, and consequently the department in which the gravest and most mature deliberation should be had, has not been appealed to, it would be inconsistent with our ideas of the purpose and functions of an appellate court, to entertain jurisdiction for the purpose of correcting the errors of its inferior sister. The presumption should be, that the court of original jurisdiction will correct any errors it may have committed, and this presumption must remain until the powers of review possessed in that court have been appealed to unsuccessfully. The justice of the appellate court should be accessible to suitors only when all the powers of the inferior court, in its original and appellate capacity and organization, had been applied, and the justice of that court exhausted. The party has no need of the aid of the appellate court until he has tried in vain the highest and ultimate department or tribunal of the court from which he would go to the appellate court. To authorize a different construction from this, we ought to have unequivocal words to that effect. These we do not find; and my conclusion is, that an appeal from a judgment by order of a single justice must be, in the first instance, to the general term of the marine court. This is the practice in the supreme court, and to this practice reference is made in the statute conferring this jurisdiction, to show how it is to be exercised.

Whether an appeal lies to the common pleas from a judgment entered by order of the general term, it is not necessary that I should consider; as the appeal in this case was confessedly taken from a judgment entered by order of a single justice. I think, however, and am compelled to decide, that it does not lie from a judgment of the marine court, entered by order of a single justice, directly to the common pleas, but must, in the first instance, be taken to the appellate branch of the court in which it originated.

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SUPREME COURT.

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Whether an *undertaking*, required on granting an order of arrest, (§ 182) is to be executed by the *plaintiff*, with sureties, or *without the plaintiff*, and one or more sureties on his behalf, is a matter resting entirely in the *discretion* of the judge who issues the order. (*See Richardson agt. Craig*, 1 *Duer*, 666, *adverse*.) And this discretion cannot be called in question, or reviewed on a motion to discharge from arrest.

A defective undertaking may be *amended*, under the provisions of the Revised Statutes, (2 R. S. 787, §§ 33, 34,) and § 173 of the Code, on a motion to discharge from arrest. (*See Beach agt. Southworth*, 6 *Barb. S. C. R.* 173, *to the same effect*.)

At Chambers, New-York, Feb., 1856.

JOHN M. MARTIN, *for motion.*

A. S. GARR, *opposed.*

DAVIES, Justice. Motion to discharge the defendant from arrest on the ground that the undertaking, executed at the time the order of arrest was granted, was not signed by the plaintiff, but by the sureties only.

Section 182 of the Code requires that, before making the order of arrest, the judge shall require a written undertaking *on the part of the plaintiff*, with or without sureties, to the effect, &c.

If the undertaking be executed by the plaintiff without sureties, he shall annex an affidavit that he is a resident and householder—a freeholder within the state, and worth double the sum specified in the undertaking.

It is contended, in support of the motion, that this provision means, that in all cases the judge shall require a written undertaking by the plaintiff—that is, executed or signed by him; and that an undertaking not signed or executed by him is to

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be regarded as a non-compliance with this provision of the Code.

But is it not manifest, that "on the part of the plaintiff," or "on behalf of the plaintiff," which are equivalent expressions, is denoted substitution, that the thing is to be done, by others, in behalf of, or on the part of, and not by the person himself?

By section 334, on an appeal to the court of appeals, a written undertaking must be executed "on the part of the appellant."

By § 222, in reference to security upon injunction, it is provided, that "the court, or judge, shall require a written undertaking *on the part of the plaintiff*, with or without sureties," &c. Under this section it has been held by the superior court, that when a non-resident plaintiff applies for an injunction, he must furnish an undertaking, executed by a resident surety. (*1 Sand. 700.*) Is not such an undertaking on the part of the plaintiff?

It seems to me, that if the framers of the Code had intended that the undertaking should have been in all cases executed by the plaintiff, they would have said so, and not used the expressions which they have. These clearly indicate, to my mind, that they did not intend to require the undertaking in every case to be executed by the plaintiff or appellant; and that if done on his part or behalf with sufficient and satisfactory security, it is a full compliance with the Code.

I think this view is fully sustained by the case in this court, of *Courter and others* agt. *M'Namara*, (9 How. Pr. Rep. 255.) In that case a motion was made to set aside the order of arrest. Upon the making of it, an undertaking was presented, executed by one Ferguson, on the part or behalf of the plaintiffs. *Harris*, Justice, held the undertaking sufficient, though it does not distinctly appear that the precise point now under consideration was raised. I cannot doubt, however, that it escaped the observation of that intelligent judge. He says, "As I understand it, the meaning of this is, that the judge shall require security to be given, but it is left to him to determine upon the sufficiency of that security. If an undertaking executed by one surety is deemed sufficient, the law is satisfied. If more are

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required, more must be given. So in case of the order for arrest, the judge may not require security at all; but if he does, he is to determine upon the sufficiency of the security. It may be one or more sureties. The only restriction upon his discretion, if security is required at all, is, that the form of the security shall be by the execution of an undertaking by one or more sureties. This, I think, is all that the provisions of the section contemplate. If so, it follows that there was no irregularity in granting the order of arrest upon an undertaking executed by one surety."

I regard it, therefore, as entirely within the discretion of the judge issuing the order, whether he will accept an undertaking executed by the sureties, or a surety only, on the part of the plaintiff, and that the exercise of his discretion cannot now be called in question.

I have not overlooked the case of *Richardson* agt. *Craig*, (1 *Duer*, 666,) where DUE~~R~~ justice, in the superior court, refused to grant an order of arrest, upon the ground that the undertaking, on the part of the plaintiff, was executed only by the surety, and not by the plaintiff. He held, that in all cases under § 182 of the Code, the undertaking must be signed by the plaintiff, and that the Code admitted of no other interpretation. He did incline to the opinion, that when the plaintiff was a married woman, or an infant, the same might be signed by the next friend or guardian, and that this would be a signing by the plaintiff.

I have reflected much upon this case, and cannot reconcile it with the language of the Code. My high respect for the eminent jurist who gave this opinion, and for those who concurred in it, have led me to doubt the correctness of my own conclusions. But they are so clear to my own mind, and are sustained, as I believe, by the authorities in this court, and the practice in it, that I cannot hesitate to follow the latter.

But if this objection to this undertaking were well founded, I have no doubt that under the provisions of the Revised Statutes, (2 *Rev. Stat.* 556, §§ 33, 34,) I have the power to permit the undertaking to be amended, by having the same executed

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by the plaintiff, and that, under § 173 of the Code, it would be my duty so to do, if I thought the undertaking defective. *Beach agt. Southworth*, (6 Barb. S. C. R. 173,) is authority for this.

By § 341 (formerly 290) of the Code, it is enacted, that an undertaking upon an appeal shall be of no effect, unless it be approved, in the first instance, by a judge of the court below, &c. The undertaking on the appeal in that case had not received such approval. In that respect, that appeal was imperfect, if security is required; for the undertaking without such approval could be of no effect.

EDMONDS, J., in delivering the opinion of the court, held, that these sections of the Revised Statutes were applicable to undertakings under the Code, and that it was competent for the court to amend the same *in any respect*; and that, thereupon, it shall be deemed valid from the time of its execution; and that the case came within the 34th section of the Revised Statutes, and might be amended in this respect.

The motion, therefore, to discharge the defendant is denied, but without costs.

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SUPREME COURT.

[No. 10.]

DAVID S. MILLS, respondent, agt. JOHN B. THURSBY and others, executors, &c., appellants.

The proceeding under § 376, &c., of the Code, by summons, against heirs, executors, or administrators, to show cause why judgment should not be enforced against the estate of a deceased judgment-debtor, is not to be treated as an *action*. It is a proceeding in court, with most of the forms of an action, but for only one *specific object*, viz., to enforce the original judgment against the estate of the deceased judgment-debtor in the hands of the parties summoned. *Costs* may be given, because, the judgment may be given in the same manner as in an action; and in certain cases costs may be given against executors in an action.

The Code probably intended that no *reply* should be put in, in this proceeding, except when the answer introduced *new matter*.

Under this proceeding against executors, a judgment is not authorized as broad as if it had been founded on a summons in an ordinary action, in which the executors could be made personally liable for the whole amount of the judgment, interests and costs.

Because, when the Code directed the summons to be, to show cause why judgment should not be enforced against the estate of the deceased, in the defendants' hands, it limited the objects of the proceeding to that purpose: when it directed judgment to be given in the same manner as in an action, it meant, in the same manner as in an action like this—*instituted for a certain specified purpose, and against executors*; and when it gave an alternative, that the application of the property charged to the payment of the judgment might be compelled by attachment, it shows the same intent, and that the judgment to be entered was one charging certain property (“the property”) with the payment.

A reference to the old law (which is fully examined) will lead to the same conclusions. And it is not to be presumed that a great and dangerous innovation is made in the *rights* of parties, in a law apparently intended only to facilitate the remedy; and especially when, by the constitution, the codification of the law of *rights* was to be entrusted to one set of commissioners, and the codification of the law of *remedies* to another set.

In this case, the order for judgment in the court below recited the serving of the summons, affidavit, answer and original judgment, and that Thursby died 23d April, 1853, leaving the judgment wholly unpaid; and that it is still unpaid; that the defendants are his executors; and thereupon ordering that the plaintiff have judgment against the defendants as executors, for the amount of said

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judgment and interest; and also the sum of \$100, as an allowance in addition to the costs to be adjusted; and that the property and estate of J. Thursby, deceased, be applied to the payment thereof; and that the plaintiff have execution therefor, with leave to apply to the court to compel the application of said property to the payment of the same by attachment, if necessary.

A final judgment is then entered on reading the pleadings and orders in the action, that the plaintiff recover of the defendants, as executors, the amount so ordered to be paid, and interest and costs; and that the property and estate of J. Thursby, deceased, be applied to the payment thereof; and that *the defendants pay the same* to the plaintiff, and that he have execution therefor.

Held, that this judgment is just as broad as if it had been founded on a summons in an ordinary action, in which the defendants could be made personally liable for the whole amount of the judgment, interest and costs.

The judgment was modified by directing that the plaintiff recover of the executors the amount so ordered to be paid, and interest, allowance and costs—(\$23,024.94)—to be levied, in due course of administration, out of the goods and chattels which were of the deceased at the time of his death, and which have since, or hereafter may, come to the hands of the executors to be administered; and that on the plaintiff's obtaining the proper order of the surrogate, to enforce payment of said sum by execution, with liberty to move for an attachment to compel the application of any property charged with the payment of the judgment.

Matters which always *belonged to the record*, and which is plain error on the face of the record—such as in this case a personal judgment against the executors—may be taken advantage of in the appellate court, where no exception is taken in the court below. But if illegal *evidence* is admitted at the trial, or an illegal *ruling* made, an *exception* must be taken, or the error is *waived*.

New-York General Term, Feb., 1856.

MITCHELL, ROOSEVELT and CLERKE, Justices.

THE facts of this case will sufficiently appear in the opinion of the court.

N. DANE ELLINGWOOD, for appellants.

ALBERT MATHEWS, for respondent.

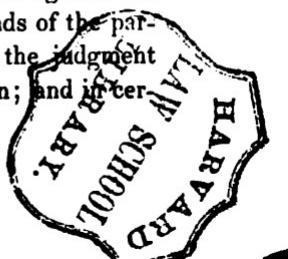
By the court—**MITCHELL, Justice.** The appeal is from a judgment against executors, founded on a judgment against their testator. The judgment appealed from did not bring in the executors as parties by a new action with a new summons and complaint, but by a new summons to show cause without any complaint, under the special provisions of § 376, &c., of the Code.

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That part of the Code is substantially as follows:—In case of the death of the judgment-debtor after judgment, his heirs, &c., may, after three years from the granting of letters testamentary, or of administration, be summoned to show cause why the judgment should not be enforced against the estate of the deceased in their hands; and his executors or administrators may be so summoned at any time within one year after their appointment.

The summons is to describe the judgment, and to be served in like manner as the original summons. It is to be accompanied by the affidavit of the person subscribing it, that the judgment has not been satisfied to his knowledge, information, or belief; and it is to specify the amount due thereon. The party summoned may answer, denying the judgment, or setting up any defence which may have arisen subsequently. The plaintiff may demur or reply to the answer, and the party summoned may demur to the reply; and the issues may be tried, and judgment may be given in the same manner as in an action, and enforced by execution, or the application of the property charged to the payment of the judgment may be compelled by attachment, if necessary.

The Code does not treat this proceeding as an action: it directs the judgment to be given in the same manner as in an action; thus negativing the idea that there is an action; and for the same reason it makes special provisions for the form of the summons, and its service, and for the pleadings, and the mode of enforcing the judgment: it studiously avoids calling the parties plaintiffs and defendants; dispenses with any new complaint, and makes the summons, not for the payment of money or for relief, but to show cause. It is not an action for the recovery of money in its general sense, for that allows a personal judgment against the defendant: it is a proceeding in court with most of the forms of an action, but for only one specific object, viz., to enforce the original judgment against the estate of the deceased judgment-debtor in the hands of the parties summoned. Costs may be given, because the judgment may be given in the same manner as in an action; and inter-



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tain cases costs may be given against executors in an action. As it is convenient, these parties in this case may be described as plaintiff and defendants.

The summons requires the defendants to show cause why the judgment against the deceased, for \$19,456.78, should not be enforced against the estate of the deceased in their hands, or why further relief should not be granted. The latter part, as to the further relief, may be discarded, as it is unauthorized by the Code. It allows the summons but for one thing, viz., to show cause why the judgment should not be enforced against the estate of the deceased in the hands of the defendants. Then follows the affidavit required by the Code.

The defendants answer the summons, denying that such judgment as was described in it was obtained against the deceased. No reply was put in, and probably the Code meant one to be put in, in this proceeding only when the answer introduced new matter.

At the trial the original judgment was produced in evidence—it was for \$19,455.98, instead of \$19,456.78. The judge disregarded the variance, and no exception was taken to his decision: if one had been taken, the variance could not have misled, and was properly disregarded. An order for judgment was then entered, reciting the service of the summons, affidavit, answer and original judgment; and that Thursby died 28d April, 1853, leaving the judgment wholly unpaid; and that it is still unpaid; and that the defendants are his executors; and thereupon ordering that the plaintiff have judgment against the defendants, as executors, for the amount of said judgment and interest; and also the sum of \$100 as an allowance, in addition to the costs to be adjusted; and that the property and estate of J. Thursby, deceased, be applied to the payment thereof; and that the plaintiff have execution therefor, with leave to apply to the court to compel the application of said property to the payment of the same, by attachment if necessary.

A final judgment is then entered, on reading the pleadings and orders in the action, that the plaintiff recover of the defendants, as executors, the amount so ordered to be paid, and

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interest and costs, and that the property and estate of J. Thursby, deceased be applied to the payment thereof; and that the defendants pay the same to the plaintiff; and that he have execution therefor.

This judgment is just as broad as if it had been founded on a summons in an ordinary action, in which the defendants could be made personally liable for the whole amount of the judgment, interest and costs. The ordinary summons would require the defendant, in such case, to answer the complaint in twenty days, or the plaintiff would take judgment for the sum specified therein. (*Code*, § 129.) No such summons is authorized in this case; and yet here is such a judgment as might be allowed in that case, viz., that the plaintiff recover of the defendants, as executors, the original judgment, interest and costs, and that the defendants pay the same, and that the plaintiff have execution therefor. The words "as executors" standing alone, do not limit the recovery to assets in their hands, but only have the effect to show that when they pay, they pay as executors, and are to be credited in their accounts accordingly: and the latter part of the judgment, "that the defendants pay the same," has no such qualification.

When the Code directed the summons to be to show cause why judgment should not be enforced against the estate of the deceased in the defendants' hands, it limited the objects of the proceeding to that purpose; when it directed judgment to be given in the same manner as in an action, it meant in the same manner as in an action like this, instituted for a certain specified purpose, and against executors; and when it gave an alternative, that the application of the property charged to the payment of the judgment may be compelled by attachment, it shows the same intent, and that the judgment to be entered was one charging certain property ("the property") with the payment.

A reference to the old law will lead to the same conclusions; and it is not to be presumed that a great and dangerous innovation is made in the rights of parties, in a law apparently intended to facilitate the remedy; and especially when, by the

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constitution, the codification of the law of rights, was to be entrusted to one set of commissioners, and the codification of the law of remedies to another set.

By the common law, various preferences in payment were allowed in actions against executors; judgments, although not docketed, over bonds; bonds over simple contract debts; and in each class, the one first commencing his action, over others who had not been so expeditious.

The Revised Statutes gave the preference to a judgment only when it was docketed, and these according to their priority of docket, and abolished all preferences of bonds over simple contract debts, or of one class, by priority of action or judgment, over others of the same class. This plaintiff can claim no preference, as it does not appear that his judgment was docketed. (*See Term R.*)

By the common law, the judgment against an executor was never general, as against one personally liable, but was always special. Even if he pleaded *ne unques executor*, or a release to himself, and the issues were found against him, the judgment was, that the plaintiff recover a certain sum, to be levied of the goods and chattels of the testator in his hands, and if there were no such goods, then to be levied of his proper goods. For these two false pleas he might be subjected to this ultimate liability:—that liability, it is believed, is abolished since the Revised Statutes.

If he suffered judgment by default, or gave a cognovit, or pleaded any other plea than *ne unques executor*, or a release to himself, and that issue were found against him, the judgment was not against him personally for the debt, but it was still special, to be levied of the goods of the testator; and if these were not sufficient, then the costs, and not the debt, were to be levied of the executor.

If, on the execution issued on the last judgment, the sheriff returned that the executor had eloigned the goods of the testator before the coming of the writ to him, the executor would be liable, as on a devastavit, to the extent of their value, and a *fi. fa.* could then issue against him personally, to be levied of

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his own goods and lands. (*See People ex rel. Fogalsanger agt. Judges, &c., of Erie*, 4 Cow. 445.)

There is nothing in the Revised Statutes, or in the Code, to dispense with the necessity of these special forms of judgment. It is proper that they should be continued in suits against executors as far as they are still applicable, and they are peculiarly proper where the proceeding is (by the law under which it is permitted) limited to a remedy against the estate of the deceased in the hands of the defendant.

The defendant is not barred by any setting up a want of assets. By the common law, the executor might plead that he had no assets, or not enough to satisfy the plaintiff's demand, after satisfying other demands having a preference; and the plaintiff either admitted this plea, and then could only take judgment of assets when they should hereafter be received, or he took issue on the plea, and then his judgment still was special as in other cases: it did not require any order of a surrogate, or any accounting before him, to authorize an execution on the judgment.

The Revised Statutes are express, that "no execution shall issue upon a judgment against an executor or administrator, until an account of administration shall have been rendered and settled, or unless on an order of the surrogate who appointed him. And if an account has been rendered, that execution shall issue only for the sum which shall have appeared on the settlement of such account to have been a just proportion of the assets applicable to the judgment. (2 R. S. 88, § 32.)

This does not interfere with the forms of judgments in the courts of law. It includes every judgment against an executor, and forbids the execution to issue against him in any case until there has been a final accounting before the surrogate, or a special order of that officer. That order may be obtained by any creditor, whether at large or with a judgment, and whether judgment were by default or after a trial upon the merits, at any time after six months from the granting of the letters testamentary, but not before; (*id. p. 116, § 18;*) and it may be obtained by a creditor who has obtained a judgment "after a trial

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at law upon the merits," at any time after the judgment, although within the six months. (*Id.* 116, §§ 20, 19.) The broad language of § 18 seems to have been overlooked in the *dictum* in *People agt. Judges Albany, &c.*, (9 *Wend.* 489.) It is upon the application of a creditor, the payment of any debt or a proportional part thereof, may be decreed at any time after six months', &c. "A creditor" includes one who has obtained judgment by default, as well as one who has no judgment; and he is in no way deprived of any right to apply to the surrogate, or exempted from the liability to do so, more than other judgment-creditors against an executor, except that he cannot apply until the six months have expired, and one who has obtained judgment at law upon the merits, can apply at any time thereafter, although within the six months. These latter sections do not alter the effect of 2 R. S. 88, § 32, which forbids an execution on a judgment against an executor in all cases, unless on the order of the surrogate; or the executor's account has been settled by the surrogate. (*See Winne agt. Van Schaick*, 9 *Wendell*, 448.)

It might seem that, with such a system, it would be quite unnecessary for an executor to put in any plea of no assets, or of insufficient assets; and accordingly those two pleas are not among those authorized by the Revised Statutes, although two others somewhat akin to them are authorized. Section 31, of 2 R. S. 88, allows an executor to show, under a notice given with his plea, that there are debts of a prior class unsatisfied, or that there are unpaid debts of the same class with that on which the suit is brought. It does not direct that the executor then proceed and allege that he has not sufficient assets to pay all these debts, or that he put the amount of assets in any way in issue: for that question the surrogate is most fitted to determine, having the power to bring all the creditors before him to attend the settlement of the account, and so at one time to decide it so as to bind all. Then the section directs the judgment, which is to be entered: it is to be rendered only for such part of the assets in his hands as shall remain, after satisfying the debts of the prior class, and as shall be a just proportion to

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the other debts of the same class with that on which the suit is brought.

This describes the form of the judgment: it is to be substantially in the words mentioned, and as an old common law judgment would be in that case, and is not first to inquire what the amount of those assets were, (when that was not put in issue,) and then specify that precise amount in the judgment. Such a form would be inconsistent with the next section (32, above quoted) forbidding an execution on such a judgment, until the action of the surrogate was first had.

Section 31 also provides for the other case, where the plaintiff chooses to admit the defendant's plea of other debts to be paid first, or *pro rata*, and allows him (as the common law did) to take judgment for the whole or part of his debt, to be levied of future assets.

The Revised Statutes have not (in this view of the law) altered the necessity of the special judgment, as at common law, except that it prescribes a form requiring the payment of the debt to be out of the assets of the deceased; and does not, in that form, authorize the debt to be paid out of the property of the executor. The inference, therefore, is, that no such judgment now prevails in any case.

The costs may sometimes be payable by the executor personally, but that case is specially provided for.

Section 38 (37) of R. S. 618, is, that in suits against executors the costs shall be collected of the assets of the deceased, unless in cases provided for in § 41 of 2 R. S. 90. That section allows no costs against executors to be levied either of their property or of the property of the deceased, unless it appear that the demand was presented within a certain time, and its payment unreasonably resisted or neglected, or that the executor refused to refer it; in which cases the court may direct such costs to be levied of the property of the executor, or of the deceased, as shall be just—having reference to the facts as they appeared on the trial.

It might have been supposed that it was necessary that the judgment-record should show that the court specially inquired

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into the facts which would authorize the allowance of costs; but the supreme court held otherwise in *Mulhaus' executors agt. Gillespie*, (12 Wend. 349, &c.)—it being presumed that the court would do its duty, and it not being usual to put in the record matters arising on motion. The result is, that the judgment in this case shows no error in awarding costs against the executors, as it might be that facts were presented to the judge at special term, which he considered as authorizing that disposition of the costs, nor in allowing some judgment in favor of the plaintiff rather than against him, but that the judgment should have been that the plaintiff, David S. Mills, do recover of the said John B. Thursby, &c., as executors and executrix as aforesaid, of the last will and testament of the said J. Thursby, deceased, the said amount so ordered to be paid, and interest, allowance and costs, amounting in the whole to the sum of \$23,024.94, to be levied, in a due course of administration, out of the goods and chattels which were of the said J. Thursby, deceased, at the time of his death, and which have come to the hands of the said John B. Thursby, &c., executors, &c., as aforesaid, to be administered, or which may hereafter come to their hands, as such executors, to be administered; and that on the said David S. Mills obtaining the proper order of the surrogate of the proper county, the payment of said sum of money may be enforced by execution; and that the said David S. Mills be also at liberty to move that the application of any property charged with the payment of this judgment, be compelled by attachment, if necessary.

In *Sanford agt. Granger*, (12 Barb. 403,) it is said that the appellate court ought to take notice of an objection apparent on the record, and which goes to the merits of the case, although not taken in the court below. The rule, if thus confined to what is strictly a part of the record, and not mere matter of exception and of evidence, is correct. If illegal evidence is admitted at the trial, or an illegal ruling there made, and no exception be taken to it, the error is waived. But those matters which always belonged to the record must be free from error, or the unsuccessful party may avail himself of

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the objection in the higher court. If a certain proceeding is allowed only for the purpose of applying property of the debtor in the hands of third parties to the payment of the debt, and the creditor then takes a personal judgment, it is plain error on the face of the record; and as the defendant has no opportunity to object to the error in the judgment in the court below, he must be allowed to do so by appeal.

Still, as the record shows the whole extent of the error, and precisely how it should be cured, it is the duty of the court so to modify the judgment as to correct any error, not to reverse it entirely.

The judgment should be modified as above stated, without costs to either party on the appeal.

SUPREME COURT.

GEORGE YOUNGS, respondent, agt. PETER J. SEELY and MARY E. SEELY, his wife, appellants.

In an action against husband and wife, to set aside a deed of lands made to the wife by her father, as fraudulent against the creditors of the father, &c., the *answer* of the defendants should be *verified* (the complaint being verified) by the wife, as well as the husband. She has a separate interest and estate from the husband.

On a motion by the plaintiff to strike out the defendants' answer, the defendant cannot set up the objection of multifariousness, or that several causes of action are improperly joined in the complaint. The defendants' remedy is to move to *strike out* a portion of the complaint, or to *demur* to the complaint under § 144, sub. 5, of the Code. By omitting to move or demur, the defendant is to be deemed as having waived the objections. (§ 148.)

Monroe General Term, Dec., 1855.—Submitted.

JOHNSON, T. R. STRONG and WELLES, Justices.

APPEAL from order of special term, setting aside answer, &c.
The action is for the partition of certain premises, situated

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in Milo, Yates county, and also to set aside a deed therein mentioned to the defendant Mary E. Seely.

The complaint shows that, on the 15th day of Nov., 1852, the defendant Peter J. Seely and Abel B. Hunt, were seized as tenants in common in fee simple of the premises, describing them. That, on the same day, the plaintiff obtained judgment against said Hunt in the supreme court for about \$7,137.80, duly docketed on the same day in Yates county. That after that day, and before the 11th day of May, 1853, several other judgments were obtained against the said Abel B. Hunt in said supreme court, stating them, amounting in all to \$777.83. That executions were issued upon all the said judgments to the sheriff of Yates county, who, by virtue thereof, on the 11th of May, 1853, duly sold the interest of Abel B. Hunt in said premises to the plaintiff; and on the 12th day of August, 1854, conveyed the same to the plaintiff pursuant to said sale, whereby the plaintiff became, and still is, the owner of the equal undivided interest of said Hunt, and became seized as tenant in common of said premises with the defendant Peter J. Seely, alleging that the plaintiff and the defendant Peter J. Seely now own said premises in fee simple, as tenants in common—each being seized in fee simple of the one equal undivided half-part thereof.

The complaint then alleges, that the said Abel Hunt and wife, on the 6th of August, 1852, conveyed, by quit-claim deed, to the defendant Mary E. Seely, the wife of the defendant Peter J. Seely, and the daughter of the said Abel B. Hunt, his interest in the said premises, being the equal undivided half-part thereof.

The complaint also alleges that the defendant Peter J. Seely, has received the whole of the rents and profits of the property thus held in common, and refuses to account, &c.

The complaint alleges that when the deed was given by Abel B. Hunt to his daughter, the defendant Mary E. Seely, he, the said Hunt, was largely insolvent, and was indebted to the several plaintiffs, in the judgments before mentioned, for the respective debts and demands for which the judgments were ob-

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tained. That said deed was given without any consideration, and for the purpose of defrauding the creditors of the said Abel B. Hunt, and particularly the plaintiff.

The complaint then asks for judgment, that said deed from Hunt to the defendant Mary E. Seely, be declared void as against the creditors of said Hunt, and particularly as against plaintiff.

That defendant Seely be decreed to account, &c., and for partition, &c. The complaint was duly verified by the plaintiff.

The defendants put in their joint and several answer, as follows:—

1. They each say that defendant Peter J. Seely and the said Abel B. Hunt, were not, on the 12th Nov., 1852, or at any time since, seized as tenants in common of the premises, &c.

2. That said Abel B. Hunt was not, on the 12th Nov., 1852, or at any time since, legally seized of the one equal undivided half of the premises mentioned in the complaint.

3. That the plaintiff did not, by virtue of the said sale and purchase, become the owner of the equal undivided half of said premises; and that plaintiff was not, at the time of the commencement of this action, seized as tenant in common of said premises with the defendant Peter J. Seely, &c.

4. That said plaintiff, and the defendant Peter J. Seely, at the time of the commencement of this action, did not own the said premises, as mentioned in the complaint.

5. That said Abel B. Hunt was not indebted to plaintiff, at the time of making, executing and delivering the quit-claim deed by the said Abel B. Hunt and wife to this defendant Mary E. Seely, as mentioned in said complaint.

6. That the said deed to defendant Mary E. Seely, was not given to her without any consideration, nor was the same given for the purpose of defrauding the creditors of the said Abel B. Hunt or the plaintiff in this action, as mentioned in the complaint, or for any fraudulent purpose whatever.

The matters of defence in the 3d, 4th, 5th and 6th answers are stated upon the information and belief of the defendants.

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This answer was verified by the defendant Peter J. Seely only, and no excuse is shown why it was not verified by the defendant Mary E. Seely; and on that ground it was offered to be returned, and the defendants' attorney refused to receive it.

On motion made on the part of the plaintiff at a special term, held at Penn Yan, in the county of Yates, on the 26th day of November, 1855, an order was made that the answer be stricken out, and that the plaintiff have judgment upon his complaint, unless the defendants, within twenty days, put in an answer upon the merits, verified by both defendants, and pay the plaintiff ten dollars costs, and that such answer be joint or separate.

This appeal is from the whole of this order.

D. B. PROSSER, *for appellants.*

E. VAN BUREN, *for respondent.*

By the court—WELLES, Justice. The provisions of the Code on the subject of verifying pleadings, are contained in §§ 156 and 157. The latter of these sections declares that if the pleading is required to be verified, it must be done by the affidavit of the party; or if there be several parties united in interest and pleading together, by one at least of such parties acquainted with the facts, if such party be within the county where the attorney resides, and capable of making the affidavit.

In this case, Mrs. Seely is made a party for the purpose of litigating and settling any claim she may have under her deed from her father, Abel B. Hunt. That deed is charged to be fraudulent. If it is valid, the plaintiff clearly has no claim or right in the premises. On that question her interest, in a legal point of view, is distinct and separate from her husband, the other defendant. Her right under the deed, if it shall be held valid, will amount to a separate estate, which she would have a right to dispose of under the statutes of 1848 and 1849, independently of her husband. If this view be correct, the answer

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should have been verified, as well by her as by her husband, Peter J. Seely.

The question of multifariousness does not arise on this motion. That question could only arise on a motion by the defendants to strike out a portion of the complaint, or upon demurrer to the complaint under § 144, sub. 5. By omitting to move or demur for that cause, the defendants are to be deemed as having waived the objection. (§ 148.)

I think, also, the special term was correct in ordering judgment unless the conditions of the order were complied with. The complaint made out a case for the relief demanded, except for the objection that several causes of action were improperly joined in the same action, which, as before remarked, can only be raised on demurrer, or motion to strike out.

Order appealed from affirmed, with \$10 costs.

SUPREME COURT.

MARQUISEE agt. BRIGHAM and CRANDALL.

Where judgment is ordered for the plaintiff by reason of the *frivolousness* of the answer, by a judge of the supreme court at chambers, leave should not be given to the defendant to amend his answer or to interpose a new one; but he should be put to his motion at a special term for such leave.

The order, however, may be without prejudice to the right of the defendant to make a motion at a special term for leave to answer, or to amend his answer. In such a case the defendant should prepare his answer, or amended answer, and offer it to the plaintiff's attorney. If he declines to receive it, the defendant should embody his proposed answer in his moving papers, so that the court may see what it is, and know that it contains a good or meritorious defence to the action.

An application for judgment to a judge at chambers is not a trial of an issue of law. It is a motion, and only \$10 costs can be allowed on such application.

At Chambers, Binghamton, March, 1856.

BARRETT & RICHARDS, *for plaintiff.*

F. A. DURKEE, *for defendant Crandall.*

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BALCOM, Justice. This is an action on a promissory note, against Brigham as maker and Crandall as endorser. Judgment has been entered against the former, but the latter has answered. The plaintiff, upon a previous notice of five days, now applies to me, under § 247 of the Code, for judgment against Crandall, on the ground that his answer is frivolous. The answer is frivolous, and judgment is ordered accordingly, with ten dollars costs of the motion. Ten dollars is all the costs the plaintiff is entitled to on this application for judgment. It is not a trial of an issue of law. (*Roberts* agt. *Clark*, 10 *How. Prac. Reps.* 451; *Rochester City Bank* agt. *Rapelje*, 12 *id.*, 26.)

The defendant Crandall now asks for leave to amend his answer, or to put in a new one to the complaint. The plaintiff's attorneys object thereto, on the ground that I have no power to grant such leave on the plaintiff's application for judgment at chambers; and they insist that Crandall should be put to his motion at a special term on affidavits for such leave, so the plaintiff can oppose the motion on affidavits. If I have authority on this application at chambers to allow Crandall to amend his answer, or to put in a new one, which is very questionable, I am of the opinion I ought not to exercise it. Before Crandall should have leave to put in a new answer or an amended one, he should prepare it, and offer it to the plaintiff's attorneys; and if they shall decline to receive it, he must then make his motion at a special term for leave to amend his answer; or for leave to answer under § 174 of the Code. And he should embody, in his moving papers, the proposed answer, or amended answer, so the court may see what it is, and know that it contains a good or meritorious defence to the action. The order for judgment, however, may be without prejudice to the right of Crandall to move, at a special term, for leave to amend his answer, or to interpose a new one.

Order accordingly. (See *Tompkins* agt. *Acer*, 10 *Pr. Reps.* 309.)

Burgess agt. Stitt.

SUPREME COURT.

BURGESS agt. STITT.

An *affidavit* for an attachment, which omits the *title of the cause*—does not state who “deponent” is, whether plaintiff or defendant—and in no part of which is either *plaintiff* or *defendant* individually named, nor is it anywhere stated who is plaintiff or who defendant, is entirely *insufficient*. And it cannot be properly connected with a summons in the action so as to uphold it, especially where it appears the affidavit was made and sworn to a day previous to the issuing of the summons.

New-York General Term, March, 1855.

APPEAL from an order at special term denying a motion to vacate an attachment.

L. C. PIGNOLET, *for plaintiff.*

S. W. CONE, *for defendant.*

By the court—MITCHELL, Justice. An attachment was taken out in this case April 1, 1854, and the affidavit of the plaintiff, together with the summons, and probably an undertaking, were submitted to the judge. The affidavit had no title, and did not refer to the summons or any other paper having the title; but being submitted with the summons very readily misled the judge. The affidavit does not state who the deponent, Burgess, is, or what he has to do with the suit; but states that “this action is brought for the recovery of the sum of \$1,200 for goods sold and delivered by plaintiff to defendant,” “part of which is secured by a promissory note of the defendant,” and “that the defendant is not a resident of this state—and that the defendant has property in this state.” In no part of the affidavit is either Burgess or Stitt named, except that Burgess is the deponent; and in no part of it is it stated who was plaintiff or who defendant. It might, therefore, be used in an action to

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be brought by any plaintiff against any defendant—even by Stitt against Burgess. Such an indefinite affidavit cannot be the basis of any legal proceeding.

To add to its defects, it was sworn to on the 81st of March, and no summons even was made out until the next day, the 1st of April; nor was any other paper than the affidavit prepared until the 1st of April. There is no possibility, therefore, of considering any of them as having been connected with the affidavit when it was made, so as by connection to sustain it.

The order, denying the motion to vacate the attachment, should be reversed, with \$10 costs of appeal and \$10 costs of motion below—the defendant stipulating not to sue for the irregularity.

MORRIS, J., concurred.

SUPREME COURT.

MICHAEL WARNER and others agt. ASA B. NELLIGAR.

By § 455 of the Code, the general provisions of the Revised Statutes, (2 R. S. 304, §§ 7, 8, 9 and 10,) relating to actions concerning real estate, are made applicable to actions brought under the Code, according to the subject matter of the action, and without regard to its form. It was intended to retain the convenient mode of *pleading* in these actions, as prescribed by the Revised Statutes.

It is enough, therefore, for the plaintiff, in an action to recover the possession of lands, to state, what estate he claims in the land, and that he was in possession on some day after his title accrued, and that the defendant, having afterwards entered into the possession, unlawfully withholds such possession from the plaintiff.

Albany Special Term, April, 1855.

MOTION to strike out, &c.

The action was brought to recover the possession of land. The plaintiffs stated that, on or about the 18th day of February, 1852, they were the owners, and lawfully possessed of the

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lands and premises described, and claimed to hold the same in fee, “under and by virtue of a deed thereof, executed by Gilbert Cropsey, late sheriff of Rensselaer, to the plaintiffs, on the said 18th of February, 1852, on a sale previously made by said sheriff of said premises, by virtue of several executions against said Nelligar.” The latter clause, embraced in quotations, the defendant moved to strike out as irrelevant, &c.

G. VAN SANTVOORD, *for plaintiffs.*

WILLIAMS & KIPP, *for defendant.*

HARRIS, Justice. In *Lawrence agt. Wright*, (2 Duer, 678,) Mr. Justice DUER seemed to think it was to be regretted that, in all actions relating to real estate, a compendious form of pleading, like that authorized by the 166th section of the Code, had not been prescribed. The learned judge had evidently failed to observe that the legislature had done precisely what he was inclined to approve.

By the 455th section of the Code, adopted for the first time in the revision of 1849, it is declared, that “the general provisions of the Revised Statutes, relating to actions concerning real property, shall apply to actions brought under this act, according to the subject matter of the action, and without regard to its form.” The language of this section is obviously sufficiently broad, and was, no doubt, intended to retain the convenient mode of pleading, in the actions to which it relates, prescribed by the Revised Statutes. (See 2 R. S. 304, §§ 7, 8, 9 and 10.) It is enough now, as it was before the adoption of the Code, for the plaintiff, in an action to recover the possession of land, to state what estate he claims in the land, and that he was in possession on some day after his title accrued, and that the defendant, having afterwards entered into the possession, unlawfully withholds such possession from the plaintiff. It was, therefore, quite unnecessary for the plaintiffs to superadd to these requisite allegations, a statement of the conveyance under which they claimed to hold the premises. The statement, however, is made in a single sentence of five lines,

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and cannot, by any possibility, prejudice the defendant, or embarrass him in pleading.

While, therefore, I am inclined to grant the motion, on the ground that, technically, the matter is redundant, I do not think the plaintiffs should be charged with costs, especially as the decision in *Lawrence agt. Wright*, above cited, had left the question in some doubt as to the proper mode of pleading in such an action.

SUPREME COURT.

PEARCE and others agt. BEACH and others.

It is not sufficient ground for setting aside an assignment for the benefit of creditors, that the assignees are men of limited means, and had been clerks for the assignors in their business prior to the assignment, where it appears that the assignees are men of unimpeached integrity, of mature years, and well acquainted with the character of the property assigned. And especially where it appears that a large majority of those interested in the assets express no wish for a change in the trusteeship.

New-York Special Term, June, 1854.

APPLICATION for injunction and receiver.

HENRY H. MORANGE, for defendants.

BANGS & KETCHUM, for plaintiffs.

ROOSEVELT, Justice. The assignment in this case, it is conceded, was not void on its face. Its invalidity is argued from circumstances; the principal of which are the insolvency and position of the selected assignees. Both were clerks of the failing house, and both were men of very limited means—one being embarrassed by an antecedent failure of his own. The answer, however, and I think it sufficient, to these objections, which, *prima facie*, might indicate fraud, is, that although

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clerks, the chosen assignees were men of mature years, of unimpeachable integrity and business capacity, perfectly acquainted with the character of the property assigned, and such as the creditors themselves would probably have selected, (as is evinced by their subsequent approbation,) had they been previously consulted.

Although the assets amount nominally to the large sum of nearly \$500,000, the great majority of those interested in them express no wish for a change in the trusteeship, but, on the contrary, strongly urge that it should remain as it is. Under these circumstances, there being no danger to the fund, and no sufficient ground after the explanations which have been given, to impeach the good faith of the assignment, the injunction must be dissolved, and the receivership denied.

It is proper that I should add, that the supposed necessity of waiting six months to divide the assets is an error; and that a distribution may, and, in the present state of moneyed affairs, ought to be immediately made. An early dividend, although possibly not quite so large, is more important than a slight increase to result from protracted nursing.

[*Same Term.*]

THE SEABOARD & ROANOKE RAILROAD Co. agt. WM. WARD.

ROOSEVELT, Justice. The question, whether the plaintiffs, after a counter-claim has been interposed, can discontinue without the consent of the defendant, is not without difficulty; and to render the practice uniform, should be passed upon at general term. I shall, therefore, deny the defendant's motion *pro forma*, and leave him to appeal without giving security, and without costs.

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SUPREME COURT.

HARRIET VAN VOORHIS, by her guardian, &c. agt. CADWALLADER HAWES.

Where, in an action for assault and battery, in the defendant's attempting to kiss the plaintiff, it appeared that the parties were with an excursion party on a train of cars, and the defendant alleged a license to do the act, and showed that a vote had been passed in one of the cars that he should go through the train and kiss every lady in the cars, and having accomplished the enterprise in the car where the vote was passed, proceeded to the car where the plaintiff was, when he was resisted by her,

Held, that evidence offered by the plaintiff on the question of license set up, that she and her friends in that car were a *distinct party* from those in the car where the defendant was, was improperly excluded.

Ontario Special Term, Aug., 1855.

MOTION on behalf of plaintiff for a new trial on a case.

The action was for an assault and battery, and was tried at the Ontario circuit in February, 1854, before a jury, who rendered a verdict for the defendant. The facts are sufficiently stated in the following opinion.

J. W. STEBBINS, *for plaintiff.*

J. C. SMITH, *for defendant.*

WELLES, Justice. The action was for an assault and battery. It appears by the evidence detailed in the case, that on the 19th day of September, 1853, the plaintiff, with two of her sisters, and some other friends, took the cars at Miller's Corners, a station on the Canandaigua and Niagara Falls Railroad, a few miles west of Canandaigua, on an excursion trip to Niagara Falls and back. There were a number of persons joined in this excursion from various points on the railroad. On their return in the afternoon, and when the train was between Tonawanda and Akron, Erie county, coming east, the plaintiff was sitting on the wall-seat, when the defendant came into the car

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through the east door, from another car in the same train, and came up to where the plaintiff was sitting, seized her by the shoulders—upon which she became frightened, and screamed. The defendant then informed her that another person had offered him two shillings if he would come and kiss her. She then immediately placed her head in her sister's lap, who was sitting by her side. The defendant then took hold of her, with his thumb in her bonnet and fingers in her hair, and pulled her up in an upright position. At that moment he was pulled away by a man who was sitting near. Her bonnet was jammed up, and her hair pulled over her face, as the witnesses stated, in a frightful manner.

The foregoing facts were proved by four witnesses, who agreed substantially in their evidence. On the part of the defendant, it was attempted to be shown that the circumstances attending the transaction were such as to justify the jury in implying a license to the defendant to do what was done by him.

It appeared by the defendant's evidence, that in another car of the same train, a short time previous to the transaction above detailed, a vote had been taken and passed, that the defendant should pass through the train and kiss all the ladies in the cars. That the defendant thereupon kissed all the ladies in that car, and then passed into the car where the plaintiff and her friends were sitting, with a view of completing this kissing enterprise according to the vote that had been taken.

The plaintiff offered to prove, by one of her brothers, that she was one of a party got up by the witness and what persons composed the party; and that the plaintiff, and the friends she was with, and constituting the party which the witness got up, were in no manner associated with the defendant or any of his company, or with any persons in the other car. This evidence was, on objection by the defendant's counsel, excluded by the court. In my judgment, this evidence was competent, and should have been received. It was proper for the purpose of repelling any implication of license. I am, indeed, unable to perceive anything in any of the evidence tending to show a license. On the contrary, some of the defendant's witnesses

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testify that the plaintiff resisted the defendant's attempt to kiss her, and not one of them shows that she assented by word or action. The jury, however, found some ground—(and what it was I have failed to discover)—upon which they wholly acquitted the defendant. If it was that he had a lawful right to kiss the plaintiff, without her consent, they mistook the law, and their verdict on that ground should be set aside. If they imagined they could perceive anything in the evidence tending to establish such license or consent, or from which it could be implied, the evidence excluded was competent on that question. On either ground, therefore, there must be a new trial, with costs to abide the event.

Ordered accordingly.

SUPREME COURT.

BROWN agt. MITCHELL and others.

It is not a valid objection to the amendment of a clerical error in an answer, that the answer contains the defence of usury.

Nor, *it seems*, would it be a valid objection to a motion for leave to put in a defence to the action, that the answer sets up usury.

New-York Special Term, March, 1856.

THIS is a motion for leave to serve an amended answer; the original containing a clerical error, by using the name of the plaintiff instead of that of George Bowman, the assignor of the note in suit, and from whom the plaintiff derives title.

GEORGE P. NELSON, *for motion.*

HOWARD C. CADY, *opposed.*

DAVIES, Justice. Under ordinary circumstances, such a motion would be granted, as of course.

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It is earnestly contended, on the part of the counsel for the plaintiff, that this correction of the defendant's answer should not be permitted, because they set up the defence of usury.

It may be remarked, as an answer to the objection thus urged, that the present is not like *Bates* agt. *Voorhies*, (7 How. Pr. R. 234,) and other cases cited. They were cases where the defendant sought leave to *set up* the defence of usury, which the court for the reasons stated, refused. In the present case that defence is set up or interposed, and the question is, will the court permit the correction of a clerical error. I have no doubt of the duty of the court to permit it, however unconscionable may be the defence contained in the answer.

But even if this were a motion to permit the defendant to set up or interpose the defence of usury, I should feel it my duty to permit such an answer, under proper circumstances, to be put in.

I cannot but concur with Justice PARKER, in *Grant* agt. *McLaughlin*, (4 How. Pr. R. 216,) where he says, "So long as the statute makes the taking of usury a defence, it was entitled to be treated like any other legal defence, and he would make no discrimination in imposing terms."

In *Catlin* agt. *Gunter*, (1 Duer, 253,) the court refused to amend pleadings to conform to the evidence produced on the trial. The reason given was, that "in our judgment, it would not be a proper exercise, but an abuse of our discretion, so to amend an answer after a trial as to let in the defence of usury against a holder for value."

The judgment of the superior court in this case was reversed in the court of appeals. (1 Kern. 368.) The court say, "We are not, I conceive, warranted in applying a different rule to the defence of usury, from that which we would hold applicable in other cases. It is a defence allowed and provided by law. The defendant, in seeking to avail himself of the evidence, notwithstanding the variance, did not claim an indulgence from the court, but simply asked for the application of those rules which the legislature have provided for all cases indiscriminately, whether the party invoking their exercise was

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seeking to visit his adversary with a forfeiture or not. The law has not made any distinction between such defences and those where no forfeiture is involved, *and the court can make none*. If the sense of the legislature is plainly expressed, as it seems to me to be, we have no judgment to pass upon the policy of these provisions."

The motion, therefore, must be granted, on payment of \$10 costs of opposing.



SUPREME COURT.

JOHN W. STEBBINS agt. THE EAST SOCIETY OF THE METHODIST EPISCOPAL CHURCH, ROCHESTER.

The question for the court, in all cases upon *confession of judgment*, is, whether in view of the *particular facts of each case*, the statute, which is entirely new, (*Code*, §§ 382, 383,) has been substantially complied with? And it is the duty of the court to construe the act liberally in furtherance of justice, and not hypercritically.

It was held, that the statute, in the thirty-seven judgments confessed by these defendants at one time, had been substantially complied with, *except* so far as related to the *statement of facts out of which the indebtedness arose*, and as to such statement, (being the same in each,) it was held that it was altogether too vague and indefinite.

The statement was as follows:—"The following is a statement of facts upon which this confession of judgment is founded: Since the 10th day of December, 1845, the said A—— B—— (plaintiff) has lent and advanced to the said defendant the sum of two thousand, one hundred and thirty dollars, to pay off and discharge the debts of said defendant, and which has been used for the purpose of paying off said debts—no part of which has since been repaid to said A—— B——, and the defendant is now justly indebted to said A—— B—— in that sum."

This does not state when the money was lent, or paid and advanced—whether in one sum or in many. It should have stated whether this money was all advanced at one time or at several times, and when and in what sums.

Besides, it is defective in respect to the application or use of the money. The statement, that "it was lent and advanced to pay off and discharge the debts

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of said defendant," gives no such information in regard to the transaction out of which the debt originated, as the creditor, seeking to impeach the judgment, is entitled to.

The defendant being a religious corporation, and having, as such, no proper dealings, except to defray the ordinary expenses of the church and the payment of its minister, is bound to explain to its creditors, where it confesses judgments like these, how such debts arose, for what consideration, and who was the creditor or creditors who have received such large sums of money—(some \$14,000 in all)—and whether they were real *bona fide* debts of, or donations to the church or congregation.

Monroe General Term, March, 1856.

Present, Justices T. R. STRONG, WELLES and SMITH.

MOTION to set aside judgment, and thirty-seven other judgments against same defendants, in favor of other plaintiffs.

SELAH MATHEWS, for motion.

HENRY R. SELDEN & W. S. COGSWELL, opposed.

By the court—E. DARWIN SMITH, Justice. Before the passage of the Code, judgments were confessed by bond and warrant of attorney: judgment was entered up for the penalty of the bond, and execution issued for the amount specified in the condition thereof, with costs; or for so much thereof as the plaintiff claimed to be due. There was no restraint upon the confessions of judgments for such sums as the parties pleased, and judgments thus entered up could only be set aside on motion, or by bill in chancery for fraud in fact. Judgment by confession, under the old system, had become so common and fruitful source of fraud, that the commissioners on the Code (*see their Report, p. 237,*) recommended the legislature to change the practice.

The provisions of the Code authorizing and regulating confessions of judgment out of court now in force, are entirely new; and as they were professedly designed to remedy the old evils, should be so construed as to further that end, while this *simple* mode of obtaining judgment should not be needlessly embarrassed. The guards which the Code (§§ 382, 383,) have thrown around the confessions of judgment in furtherance of this

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object, are "a written statement signed by the defendant, and verified by his oath—stating the amount for which the judgment may be entered, and authorizing the entry of judgment therefor, and containing also a concise statement of the facts out of which it (the indebtedness) arose, and showing that the sum confessed therefor is justly due, or to become due." The question for the court in all cases under this act is, whether, in view of the particular facts of each case, this statute has been substantially complied with? And it is our duty to construe it liberally in furtherance of justice, and not hypercritically. (*Code*, §§ 159, 467.)

The provisions of the statute in these thirty-eight judgments, I think, have been substantially complied with, except so far as relates to the statement of facts out of which the indebtedness arose, for which they were respectively confessed.

The confession in favor of John Stroup is for \$2,130. The statement in this case, which is a fair sample of all, (except the judgment in favor of John H. Stebbins,) is as follows. "The following is a statement of the facts upon which this confession of judgment is founded: Since the 10th day of December, 1845, the said John Stroup has lent and advanced to the said defendant the sum of two thousand, one hundred and thirty dollars, to pay off and discharge the debts of said defendant, and which has been used for the purpose of paying off said debts—no part of which has since been repaid to said John Stroup, and the defendant is now justly indebted to said Stroup in that sum." With slight verbal variations, the statement in the thirty-six other judgments is the same in substance with the above. Is this a concise statement of the facts out of which the indebtedness arose for which these judgments were confessed within the meaning and intent of the statute?

The court of appeals, in the case of *Chappell* agt. *Chappell*, (2 *Kernan*, 215,) has given a construction to this section of the Code. The judgment in that case was confessed upon two promissory notes of which the dates and amounts were given, and time of payment. The court held that this statement was insufficient, that the consideration of the notes should have

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been given. Judge GARDINER, who gave the leading opinion, says, "The statute looks not to evidence of the demand, *but to the facts in which it originated*; in other words, to the consideration which sustains the promise:" and he also refers to and adopts the reasoning of the court in *Lawless agt. Hackett*, (16 John. 149.)

The case of *Lawless agt. Hackett* arose under the act of 1818. (*Vide Sess. Laws of 1818, chap. 280, § 8,*) which required "a particular statement and specification of the nature and consideration of the debt or demand on which such judgment is confessed." In the case of *Lawless agt. Hackett*, part of the specification was in these words: "for money lent and advanced by the plaintiff to the defendant; and also for money lent and advanced by the plaintiff to the defendant at various times—the money lent being to the amount of \$400." This statement the supreme court held, in that case, was not a sufficient statement of "the nature and consideration of the debt or demand:" and Chancellor KENT, (*in 5th John. Ch. Rep. 326,*) speaking of this very specification says, "It is too general and loose to meet the mischief which the statute was intended to prevent."

In the case of *Chappell agt. Chappell*, Justice DEAN also says, "the intention of this requirement (speaking of § 383 of the Code) was to compel the person confessing a judgment to disclose, under oath—which oath was to become part of the public records—what was the real consideration of the judgment confessed, to show to all interested '*the transaction out of which the debt originated.*'"

Applying the principles and tests of these views and decisions to the statement of facts on which the judgment of John Stroup and the thirty-six others just like it are founded, these judgments cannot be sustained. In the language of Chancellor KENT, above cited, the statement "is too general and loose to meet the mischief which the statute was intended to prevent."

The statement is altogether too vague and indefinite. It does not state when the money was *lent*, or paid and advanced, —whether in one sum or in many. It states that "it has been

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lent and advanced since December 10th, 1845." Certainly, the defendant could easily have been more specific; and, in a concise statement, it could and should have stated whether this money was all advanced at one time or at several times, and when, and in what sums. The statement is also defective in respect to the application or use of the money. It states that, "it was lent and advanced to pay off and discharge the debts of said defendant." This gives no such information in regard to the transaction out of which the debt originated, as the creditor seeking to impeach the judgment is entitled to: all he learns from this statement is that the money was lent and advanced to pay debts during a period of ten years. What the debts were for, and who was the creditor, he was entitled to know, and it is not stated.

Taking all these judgments together, all of which were confessed at the same time, and they amount to the sum of about \$14,000. The creditor, seeking to collect his debt of this defendant, and seeking to impeach these judgments, has a right to know for the payment of what debts so much money was borrowed by this defendant. The defendant being a religious corporation, and having as such no proper dealings except to defray the ordinary expenses of the church, and the payment of its minister, is bound to explain to its creditors, where it confesses judgments like these, how such debts arose, for what consideration, and who was the creditor, or the creditors, who have received such large sums of money. The creditor has a right to look into the transaction out of which the claims upon which these judgments were confessed originated, and to see whether they were real *bona fide* debts of, or donations to, the church or congregation. For this purpose he is entitled to a more full disclosure than is here given of the nature and consideration of the debts, and the character of "the transaction out of which such debts originated," else the concise statement of the facts required by the statute is little or no improvement upon the old mode of confession by bond and warrant of attorney.

The judgments in these cases cannot be sustained within the

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principles, besides the cases above cited—decided in *Plummer* agt. *Plummer*, (7 *How. Pr. R.* 62,) *Schoolcraft* agt. *Thompson*, (*id.* 447,) *Bruce* agt. *Purdy*, (10 *id.* 497,) *Boyden* agt. *Johnson*, (11 *id.* 504,) and several other cases at special term: nor within the principles held in this district at general term in the case of *Schoolcraft* agt. *Thompson*, (9 *Howard*, 61.) Justice *Johnson*, in his opinion in that case, says, “*The time and nature of the transaction*, and the consideration of the indebtedness, in concise and general *terms*, must be sufficient, unless a bill of particulars is required.” These confessions clearly do not come up to this rule. The learned justice also says, “I agree with the justice at special term, that the general object and intent of the provisions were to protect third persons from fraudulent judgments, by furnishing them the means of detecting and defeating the fraudulent designs.” Because these confessions do not furnish the creditor with these “*means*,” I consider them defective as concise statements of the facts, required by the statute. I agree with the learned justice, that the statute does not require a statement as full as a bill of particulars. That, in many cases, would not be a concise statement. It would be unnecessary and burdensome in many cases to give it. A statement of the consideration of the debt, and of the nature of the transaction out of which it arose, can be embraced in most cases, in a very brief compass. If the judgment is confessed for goods sold, it is very easy to state, in a few words, the amount of the bill, when and of whom purchased, and the general character of the goods—as dry goods, or groceries, or hardware. So in respect to the sale of any other property; and if the consideration be money lent, or paid and advanced, to state time and person, and amount, so that the real character of the transaction may be seen upon the face of the judgment. It can only be difficult to do this when there is some reason for concealment or mistification. The statute is a wise one, and is very easily executed.

The case of *Chappell* agt. *Chappell*, *supra*, asserts and affirms the right of a judgment-creditor of the debtor who has made or given a confession of judgment under § 383 of the Code, to

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apply to the court, by motion, to set aside such judgment—as between the parties the judgment is doubtless valid in such cases. It is only a judgment-creditor who can call it in question; and such creditor has a right to have the judgment set aside as fraudulent or void, as against him, if the statute authorizing the confession has not been complied with.

Upon this ground, all these judgments should be set aside, except the one in favor of John W. Stebbins. In this case the confession states that, in December, 1853, said Stebbins was retained to commence a suit against John E. Cole, and prosecuted same until the settlement thereof, and also acted as counsel, aided and assisted in the defence of a suit brought against the defendants by one Edward Jones, and that the sum for which said judgment is confessed (\$160) is his claim against the defendants for such services, all which are justly due. This states the nature of the claim, and the consideration, with sufficient distinctness to answer the requirements of the statute. The judgment-roll in this case was not signed by the clerk; but this we think a mere irregularity—cured by the one year's limitation of the statute in respect to formal errors and defects. (*Vol. 2d, Rev. Stat., 1st ed., p. 359, § 2.*)

The setting aside of the judgments in the other thirty-seven cases is doubtless a case of hardship in respect to these plaintiffs, and resulting as it does from the construction which we are constrained to make of a statute introducing provisions of a law entirely new, we think the motions should be granted, without costs to either party.

Motion granted as to all the judgments, without costs, except the one in respect to the judgment in favor of John W. Stebbins, which is denied.

WELLES, Justice, *dissenting.*

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COURT OF APPEALS.

[No. 11.]

DAVID S. MILLS, respondent, agt. JOHN B. THURSBY, executor, &c., appellants.

Under the Code, (1851, § 272,) a referees' report must state the facts found by them, and the conclusions of law separately; and their decision may be excepted to and reviewed in like manner as the decision of the court.

Where the general term of the court, on appeal, review the report of referees upon exceptions taken on the trial, they cannot, in the settlement of the case upon their judgment, embrace any special finding of facts.

This court cannot, in this class of cases, regard any finding of facts except such as shall be stated by the referees according to the provisions of the Code.

Where the report of the referees contains a voluminous statement of the evidence, and is not in accordance with the provisions of the Code, the general term may settle a case, abridging these statements so as to present, in a concise form, so much of the facts as are essential to an understanding of the exceptions taken on the trial.

March Term, 1856.

THIS was a motion made by the appellants to "amend the return in this case by substituting the case as settled by the supreme court in pursuance of its order, as reported in 11th *Howard's Practice Reports*, (page 134,) for the original case, annexed to said return."

ALBERT MATHEWS, *for respondent.*
N. DANE ELLINGWOOD, *for appellants.*

By the court—DENIO, Ch. J. The new case, so far as it abridges the voluminous statement of the evidence contained in the one settled by the referees, and presents, in a concise form, so much of the facts as are essential to an understanding of the exceptions taken upon the trial, is a proceeding which we have approved. If correctly prepared with the view stated, it contains everything which either party can need for the pur-

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pose of having these exceptions considered by this court. We, therefore, allow that paper to be substituted for the present case: but as there has been a misapprehension about the practice, which was very unsettled at the time these papers were prepared, and the respondent may not have attended to the correction of the case as he would have done had he supposed the practice of the opposite party would be tolerated, we think he should have an opportunity to go again before the justice by whom it was settled, with a view to its correction if it is not already accurate. For this purpose the appellants are required to give the respondent a notice of twenty days to appear before the justice, to ask for a revision of the case, if he desires to have it revised; on the justice certifying that he has heard the parties under that notice, or that the respondent's counsel did not appear pursuant thereto, and that the case is resettled, it may be attached to the return on file, in the place of the case settled by the referees; the exceptions to be contained in it are limited to those only appearing in the case as settled by the referees.

That part of the new case which embraces the special finding of facts by the general term must be omitted. This court cannot, in this class of cases, regard any finding of facts except such as shall be stated by the referees according to the provisions of the Code.

The referees in this case did not state any facts as found by them. The opinion annexed, though it refers argumentatively and in a general way to the conclusions of fact and law at which the referees arrived, is not such a paper as is contemplated by the Code.

We cannot review conclusions of fact, and there were no exceptions taken to the final decision of the referees, so as to raise a question of law for our consideration.

Neither party should have costs against the other upon this motion.

Dewey agt. Ward and others.

SUPREME COURT.

ELIAS DEWEY agt. CORNELIUS S. WARD and others.

Two equitable causes of action, constituting what would have been, under the old practice, a "*bill for partition*," and a "*creditor's bill*," cannot now be united in the same complaint.

Albany General Term, May, 1855.

Present, PARKER, WRIGHT and HARRIS, Justices.

APPEAL from order overruling demurrer to complaint.

The complaint stated that Samuel Ward died on the 11th of March, 1850, seized of a farm in the town of Jefferson, in the county of Schoharie, containing one hundred and eighty-one acres; that he left a widow, Eleanor Ward, him surviving, and four infant children, Chapman S. Ward, Polly Ward, Cornelius S. Ward and Joel Ward, in whom his real estate vested, subject to the right of dower of the widow; that the farm was worth not more than ten or twelve hundred dollars, and that the personal estate was of but little value, and the debts against the estate amounted to between eight and fourteen hundred dollars; that the family continued to reside upon the farm after the death of Samuel Ward, the widow managing the business until Chapman S. Ward, the eldest son, became of age, and after that, he and his mother continued to carry on the business together; that they made valuable and permanent improvements upon the farm, consisting of a dwelling-house, wood-house and other buildings thereto attached; that they constructed a large amount of stone-wall and other fence, and made other improvements, so that the property had come to be worth from \$3,000 to \$3,500; that during the same time the widow and Chapman had paid the debts of the estate, and all taxes and assessments upon the property, and had supported the two youngest of the children, Cornelius and Joel, defraying the expenses of their education, clothing, &c.; that to enable them to do all this, they had borrowed money from time to time upon their own personal responsibility, and, among other persons, had borrowed

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money of the plaintiff, at various times, until the 3d day of May, 1850, when their indebtedness to him amounted to \$2,000 and more; that Polly Ward, one of the children, after she became of age, and before the last-mentioned date, had conveyed her share of the farm to her brother Chapman S. Ward; that on the 3d of May, 1850, the plaintiff loaned to Eleanor Ward, the widow, and Chapman S. Ward, the further sum of \$600, to enable them to pay off the debts still outstanding against them, and took from them their bond for \$2,600, secured by a mortgage executed by them upon the farm; that default having been made in the performance of the condition of the bond, an action to foreclose the mortgage was commenced in January, 1852, and on the 30th of April, in the same year, the usual judgment of foreclosure was obtained, the amount then due being \$2,747.89, besides costs; that the interest of the mortgagors in the farm was sold under the judgment of foreclosure, on the 11th of August, 1852, and was purchased by the plaintiff for the sum of \$1,700, and the plaintiff received a deed of the premises from the referee appointed to make the sale; that the deficiency reported due upon the judgment, after applying the proceeds of the sale, was \$1,124.35, for which sum the plaintiff became entitled to issue execution against the defendants in that action; that the plaintiff, as such purchaser, was let into the possession of the premises.

It was further stated in the complaint, that no partition or division of the farm had been made among the owners, and that there had been no accounting between the widow and Chapman, and Cornelius and Joel, in respect to the improvements, payments and expenditures above mentioned; that the widow and Joel Ward still continued to reside upon the premises; that the dower of the widow had never been assigned to her, and it was charged that either she or the plaintiff was entitled to have the same assigned. It was further alleged, that by reason of the premises Cornelius Ward and Joel Ward were largely indebted to Eleanor and Chapman S. Ward, for which indebtedness they were entitled to an equitable lien upon their shares of the farm.

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The relief asked for in respect to this branch of the complaint is, that an accounting for the benefit of the plaintiff may be had as between Eleanor and Chapman S. Ward, and Cornelius and Joel Ward, in respect to the payment of the debts against the estate, and the improvements, expenditures, support, maintenance and other matters mentioned in the complaint, and that the amount found due from them be declared to be an equitable charge upon the shares of Cornelius and Joel in the farm, and, in default of payment, that their shares be sold for that purpose, and in the meantime that they be restrained from selling or encumbering their interest in the farm; that the rights and interests of all the parties interested in the farm may be ascertained and declared and partition made accordingly, or if a division cannot be made without prejudice, &c., that the same may be sold, and the proceeds divided among the parties according to their equitable rights.

It was further stated in the complaint that an execution had been duly issued upon the judgment against Eleanor Ward and Chapman S. Ward for the deficiency upon the foreclosure sale, and that the same had been returned unsatisfied; that neither Eleanor Ward nor Chapman S. Ward had property subject to execution, but that they, or one of them, had property, debts and other equitable interests, things in action, claims, demands, or effects exceeding in value one hundred dollars, which ought to, and in equity and justice should be applied towards the satisfaction of the plaintiff's judgment.

The relief asked upon this branch of the complaint was, that the defendants Eleanor Ward and Chapman S. Ward might be enjoined, &c., from selling, &c., any debts, &c., and also from doing any act for the purpose of giving preference to any other creditor over the plaintiff; that they might be decreed to apply towards the satisfaction of the plaintiff's judgment, any money or property, real or personal, in law or equity, debts, choses in action, or equitable interests belonging to or held in trust for them, or either of them, or in which they were in any way beneficially interested; and that a receiver of all the property, &c., of the defendants Eleanor Ward and Chapman S. Ward, might

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be appointed, according to the course and practice of the court, and with the usual powers of receivers in like cases.

The defendants jointly and severally demurred to the complaint, assigning for cause of demurrer, among other things, that several causes of action had been improperly united. The issue thus joined was tried at a special term in Schoharie in November, 1854, when an order was made overruling the demurrer, with leave to the defendants to answer the complaint upon payment of costs, &c. From this order the defendants appealed to the general term.

JAMES E. DEWEY, *for plaintiff.*

LYMAN TREMAIN, *for defendants.*

By the court—HARRIS, Justice. It is a general rule of pleading, both at the common law and in equity, that the declaration or complaint shall contain but a single cause of action. A violation of this rule, in a declaration at common law, is called *duplicity*—in equity, multifariousness. In either case, the objection is taken by demurrer. It is true, that in some cases at common law, several causes of action might be united in the same suit. Such cases form exceptions to the general rule: and even in such cases the causes of action must be stated in separate counts, so that, in effect, the plaintiff is but prosecuting several suits in one. The rule has not been changed by the Code. Under that system of pleading, it is still a general rule, that distinct and independent causes of action are not to be prosecuted in the same action. The exceptions to this rule are specified in the seven subdivisions of the 167th section. In respect to the causes of action there mentioned, it is declared, that they may be united in the same complaint. But, even in such cases, to authorize such union, *four conditions* must be met: The causes of action sought to be prosecuted together must all belong to one of the specified classes; all the causes of action must affect all the parties to the action; the causes of action to be joined must not require different places of trial; and, lastly, as in a declaration at common law, containing several causes of

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action, they must be stated in separate counts. A complaint which contains several causes of action, without meeting all these conditions, is still demurrable, not, indeed, for *duplicity*, or *multifariousness*, but upon the ground that "*several causes of action have been improperly united.*"

In the case under consideration, the plaintiff states facts to show that he and the defendants Cornelius Ward and Joel Ward are the owners of the farm described in the complaint as tenants in common, and that the defendants Eleanor Ward and Chapman S. Ward have equitable liens upon some of the shares of the farm. He thus presents a case which entitles him, as he claims, to a partition of the farm, or, in case it cannot be divided, to a sale and a division of the proceeds, according to the equities of the parties as they shall be adjusted by the court. This is one cause of action.

He next presents himself as a judgment-creditor of two of the defendants, Eleanor Ward and Chapman S. Ward, alleging that, as they have no property liable to execution, but have equitable assets and effects, he is entitled to the judgment of the court, directing that such equitable effects shall be applied to the satisfaction of his debt. This constitutes another and a distinct cause of action. Both causes of action are of equitable jurisdiction. The one is what in equity would have been denominated, a bill for partition; the other, a creditor's bill. They are entirely distinct, and independent of each other. Each, if sustained, will entitle the plaintiff to its peculiar and appropriate relief. Either one may be sustained without the other. They are causes of action not specified in any of the seven classes of action mentioned in the 167th section of the Code. There is, therefore, no authority to unite them, and there being none, they are, of course, *improperly united*.

The order overruling the demurrer should be reversed, and an order entered allowing the demurrer, but with liberty to the plaintiff to amend his complaint within twenty days after notice of this decision, upon the payment of the costs of the demurrer to be taxed.

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SUPREME COURT.

KORTRIGHT agt. BLUNT and others.

The payment of taxes upon one of several lots sold on a mortgage foreclosure, out of the surplus moneys, discharges such lot from the *lien* of the taxes. And the lien or recharge of such taxes upon the lot cannot be made, even on application of a junior incumbrancer, showing that the master paid the taxes under a mistake of fact.

A *tender* punctually made on *law day*, (the day the mortgage moneys are due,) operates a discharge of the *lien*. But if not made until *after law day*, it does not discharge the *lien*, unless the tender is kept good.

New-York Special Term, March, 1855.

THE mortgage in question, bearing date 2d Feb., 1846, was made by the defendant Joseph Blunt, then owner in fee of mortgaged premises, to Jonathan Miller, to secure \$2,400, and was junior to a still larger one outstanding on the same premises, then held by the Mutual Insurance Company.

Both of these mortgages were upon premises known on the tax-rolls of the city of New-York as Nos. 8486, 8487, 8488, 8488 1-2, 8489, 1534 and 1533, of the 16th ward.

In 1846 the Mutual Insurance Company obtained a decree for foreclosure and sale under their mortgage, and report of the sale was made on the 21st May, 1847. Meantime, and on the 20th March, 1847, the plaintiff, Kortright, had become assignee and holder of the 2d of Blunt's mortgages, the same now in question.

At the master's sale, under the decree in favor of the Mutual Insurance Company, all of the lots were put up for sale by the master, and bid off—Kortright himself bidding in a portion of them, including lot No. 1533, which was the last sold.

But, on subsequently finding that the whole moneys directed by the decree to be paid, had been raised without resorting to the avails of No. 1533, the master refused to give plaintiff a deed for that lot.

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On No. 1538, at the time of such foreclosure sale, there were outstanding unpaid taxes for the years 1843, 1845, 1846.

Kortright, as the next older incumbrancer after the Mutual Insurance Company, became entitled to the whole of the surplus moneys under that sale.

From the moneys retained under the foreclosure sale, the master paid the moneys provided for by the decree and the whole of the taxes, including the assessments, on lot 1533, but refused to refund the sums paid in for taxes on 1533 after he found it unnecessary to convey that lot. The surplus then remaining, after such taxes had been paid, was something over \$300, and was paid over to Kortright; and thus he, in effect, paid the taxes on 1533, since such payment diminished *pro tanto* the surplus moneys.

The equity of redemption of the mortgaged premises in question, (lot 1533,) was sold by Blunt to John H. Agnew, subject to the mortgage in question, and by Agnew was conveyed to the defendant H. C. Cady, in June, 1847.

Cady took without knowledge or notice, constructive or otherwise, that Kortright claimed the taxes on lot 1533, above mentioned, were a lien on the land; for by the tax-books they appeared to have been paid.

This suit was commenced in July, 1847. In August, 1847, Cady tendered the plaintiff's attorney the whole amount remaining unpaid on the mortgage, and the costs of suit up to that date, which the plaintiff's attorney refused to receive, unless he would also pay the aforesaid taxes on lot 1533, which the master had paid out of avails of the sale under the Mutual Insurance Company mortgage, as above stated, which sum Cady refused to pay.

The plaintiff was not in this city (his then place of residence) when that tender was made, nor had his attorney any authority to receive the money, further than was incident to his general power as attorney.

The mortgage in question is now charged on lot 1533 alone, the other lots, which it covered originally, having been sold under the Mutual Insurance Company foreclosure sale.

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There is no testimony to show that Blunt knew or was apprised at the time of the tender made by Cady to the plaintiff. After such tender, Cady was made a party defendant.

JOSEPH BLUNT, *for plaintiff.*

JOHN M. VAN COTT, *for defendant.*

COWLES, Justice. The lien of the taxes which had been charged upon lot 1538 was discharged by the payment made by the master out of the surplus moneys on foreclosure of the Mutual Insurance Company mortgage, and that lien could not be made to attach to the land again in favor of Kortright particularly, as against a subsequent and *bona fide* purchaser for value—which was the case with Cady.

This is not the case of a payment of taxes by the mortgagee voluntarily, in order to save the mortgaged premises from a tax sale, and thus tacking such lien for taxes to his mortgage, and pursuing it as a charge on the land in his own favor. It was a payment made by mistake on the part of the master, at a time when he supposed he should need the avails of lot No. 1533, to make up the amount to be raised under that decree. It is enough, however, so far as the defendant Cady is concerned, to say that he has purchased without knowledge or notice of the facts respecting such taxes, and they, being extinguished of record, cannot be recharged as against him. The plaintiff, therefore, had no right to insist on the amount of those taxes being embraced in Cady's tender.

The next question is, did the tender made by Cady in August, 1847, discharge the mortgaged premises from the lien of the mortgage?

The courts of law and equity in this state have not been agreed whether tender after law day operated a discharge of the lien of the mortgage. The court of chancery has held that it did not. (*Merritt agt. Lambert*, 7 *Paige*, 344.) The supreme court has held that it did. (*Jackson agt. Crofts*, 18 *J. R.* 110; *Edwards agt. Farmers' Insurance and Loan Co.*, 21 *Wend.* 467.)

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The case of *Post* agt. *Arnott*, (2 Denio, 344,) in the late court of errors, has left the question still in doubt.

Under these circumstances, I feel inclined to follow the ruling of the former court of chancery upon this question.

There are obvious reasons why a tender on the day the mortgage falls due should be held to discharge the lien. That is, the day of payment fixed by the security itself. Both parties are supposed to act in reference to it, and to know the exact amount then due. The mortgagor is then bound to pay, and the mortgagee to receive the money. Neither can be taken by surprise, and tender then by the mortgagor is equivalent to payment, so far as the right to a longer lien on the land is concerned.

But if the mortgagor allows that day to pass, and becomes thus in default, it is hardly just that he should be at liberty, after the lapse of months or years, perhaps also, after partial payments of principal and interest, to select his own time and occasion for the making of a tender, when the holder of the security may be very illly prepared to know whether the amount tendered is correct or not, and acquire by such a tender the same advantages he would had the tender been made on law day. If he allows the stipulated time of payment to pass, it seems to me it is not equitable to allow a tender of the money to discharge the lien, unless the tender is kept good, and the money afterwards brought into court. It may be said, that reasonable notice of the intention to make the tender, if made after law day, would enable the mortgagee to ascertain the exact amount due; and that after such notice, the mortgagee should be held to decline receiving the money tendered at the peril of losing the lien.

There is no little force in this view of the case, and it might be conclusive did it not leave it always as an open question, whether such reasonable notice had been given. The more simple, and, as it seems to me, equitable rule, is to hold, that if tender is punctually made on law day, it operates a discharge of the lien. But if not made until after law day, that it does not discharge the lien, unless the tender is kept good.

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SUPREME COURT.

DANIEL GREEN agt. LYMAN BLISS.

The law is too well settled to admit of argument, that the affidavits of jurors are not receivable to impeach their verdict, for mistake or error in respect to the merits of a case; or for their own misconduct, or that of their fellows.

The affidavit of the constable who had charge of a jury which was sent out in the evening, to the effect that he allowed them to separate for the night before they had agreed on a verdict, is entitled to but little weight, as such conduct was in violation of his sworn duty to keep the jury together until they agreed on a verdict.

The judge at the circuit may direct the jury to seal their verdict, without the consent of the parties.

Where a jury was sent out in the evening, which had not agreed when the court was ready to adjourn for the night, and the judge, without the consent of the parties, directed the sheriff to say to the jury, they might seal their verdict, and bring it in, on the coming in of the court the next morning, which the sheriff did as he was directed; and there was no pretence that the sheriff said anything to the jury, except to inform them what the judge told him to say to them, *held* no cause for setting aside the verdict.

The strict rule requires that all of the jury should sign a sealed verdict; but where a sealed verdict was only signed by the foreman, and the counsel for the unsuccessful party was present when the verdict was delivered to the court, and he made no objection on that ground to its reception, *held*, the irregularity, if any, was waived.

Where a jury, that brought in a sealed verdict, was polled at the request of the unsuccessful party, and one of the jury, after the verdict was stated to him, in answer to the inquiry of the clerk if it was his verdict, answered, "I consented to it," and another answered, "I agreed to it," and the attention of the court was not called to the manner the jurors answered, and the counsel for the unsuccessful party, through inadvertence, supposed each juror said it was his verdict, *held* no cause for disturbing the verdict.

If each juror does not say the verdict is his, when the jury is polled, it is the duty of counsel for the unsuccessful party to call the attention of the court to the fact, if he fails to do so, even through inadvertence, he loses the right to afterwards allege the verdict was not agreed to by the entire jury, by reason of their not all answering it was their verdict.

Various questions, touching irregularities in the making up and the reception of verdicts, and the polling of juries, and the sealing and bringing in of verdicts, noticed and commented upon.

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Madison Special Term, Feb., 1856.

MOTION by plaintiff to set aside the verdict in this action for irregularity.

This action was tried at the Madison circuit in October, 1855, One of the jury, and the constable who had charge of the jury, swear, that the jury retired in the evening to make up their verdict; that after the jury had deliberated a while, they were informed by the sheriff the judge had directed that the jury should seal their verdict, and bring it into court the next morning. The fact that the judge told the sheriff so to inform the jury is uncontradicted. But it does not appear by any affidavit, whether the plaintiff's counsel consented or dissented to the direction of the judge, that the jury should seal their verdict, or whether he knew of such direction being given. Soon after this direction was given, the court adjourned for the night.

The constable and one of the jury substantially agree in their affidavits, that the jury, after consulting an hour or two, could not agree upon a verdict; that one or more of the jury complained of being unwell; and that, for the purpose of separating for the night, between twelve and two o'clock, a verdict for the defendant was drawn up, and signed by the foreman, and sealed as the verdict of the jury, and that thereupon the jury separated; but that such verdict was not, in fact, agreed to by all of the jury, nor was it signed by any of them except the foreman.

The clerk of the court and the juror aforesaid, substantially agree in their affidavits, that when the jury came into court the next morning, the foreman, in answer to the inquiry of the clerk, declared the jury had agreed upon a verdict, and then delivered the same to the clerk in the presence of the plaintiff's counsel. That thereupon the clerk said, "Gentlemen of the jury, listen to your verdict as the court have recorded it. You say you find for the defendant." That the plaintiff's counsel then requested the clerk to poll the jury; and the clerk then called the several jurors by name, and inquired if that was their verdict; that some of the jurors answered, it was; that one answered, "I consented to it," and another answered, "I

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agreed to it." The attention of the court was not called to the manner the jurors answered, and the plaintiff's counsel swears he did not notice it by reason of his attention being diverted to some other business; and that he did not know but all the jurors answered it was their verdict, till after they had dispersed.

It does not appear by any affidavit, that any objection was made to the reception of the verdict, on the ground it was sealed, or was not signed by all of the jury, or because the jury had separated during the night, or for any other reason.

Two of the jury have made affidavits, which are presented in opposition to this motion; in which they state, that ten of their number agreed to a verdict for the defendant on their first ballot; that one who was in favor of finding a verdict for the plaintiff, appeared, as they thought, to have some prejudice against the defendant or his family; but after several hours' discussion and examination of the evidence, the jury all agreed upon a verdict in favor of the defendant; that the verdict was then reduced to writing, and distinctly read over, and, as they then thought, and yet believe, all of the jury assented thereto. These two jurors also state that the jury then separated, and came into court the next morning; and, on being called, they were asked by the clerk if they had agreed upon their verdict? to which inquiry their foreman responded in the affirmative, and thereupon delivered to the court their sealed verdict, for the defendant, which they had agreed upon the night before; that when the jury was polled, and the question was asked by the clerk, "Is this your verdict?" each and every juror responded in the affirmative, as they then understood, and as they still believed when they made their affidavits.

DUANE BROWN, *for plaintiff.*
A. C. STONE, *for defendant.*

BALCOM, Justice. The law is too well settled to admit of argument, that the affidavits of jurors are not receivable to impeach their verdict, for mistake or error in respect to the merits

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of a case; or for their own misconduct, or that of their fellows. (*Clum* agt. *Smith*, 5 *Hill*, 560.) Were the law otherwise, the affidavit of a juror, who swears he assented to a verdict *as a ruse*, for the purpose of separating, would not be entitled to much weight, except for the purpose of showing the cause of a party had been tried by a juror who was unfit to be in the panel.

The affidavit of the constable who had charge of the jury, to the effect that the jury did not agree upon the verdict that was signed and sealed by their foreman, before he allowed them to separate, is *felo de se* of his credibility. He violated his sworn duty, to keep the jury together until they agreed on a verdict; or his affidavit is untrue. His affidavit cannot overturn the verdict in this action, when it is contradicted by two jurors whose statements are consistent with their integrity as jurors.

The plaintiff's counsel insists that the verdict should be set aside, because, without his consent, the judge directed the sheriff to instruct the jury to seal their verdict, and bring it into court the next morning.

In most of the reported cases in this state, where sealed verdicts have been rendered, the direction of the judge to the jury to seal their verdict, was given by the consent of the parties. (See *Root* agt. *Sherwood*, 6 *Johns.* 68; *Fox* agt. *Smith*, 3 *Cow.* 23; *Douglass* agt. *Toucey*, 2 *Wend.* 852; *Bunn* agt. *Hoyt*, 3 *Johns. Rep.* 255; *Jackson* agt. *Hawks*, 2 *Wend.* 619.)

Graham, in his Practice, says, "Where the jury are likely to be absent for some time, and the business of the day is through, it is *usual* to direct them when they shall have agreed upon their verdict, to seal it, and bring it into court the next morning. Whether the judge may do this *without the consent of the parties*, has never been expressly decided." (*Gra. Pract.* 2d ed., 816.)

I am of the opinion the judge may direct the jury to seal their verdict without the consent of the parties. It has been customary to do so: a party loses no right thereby. The jury may be polled when they bring in a sealed verdict; and they may dissent therefrom. If it is informal they may be sent out

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again to correct it, but they cannot change it after they have sealed it. (*8 Ohio Rep.* 405.) And the jury may be sent out again, where there is any dissent from their verdict as sealed.

It has been decided in Ohio, in both civil and criminal causes, that the court may, in its discretion, direct the jury to seal their verdict, without the consent of the parties. (*Sutliff* agt. *Gilbert*, *8 Ohio Rep.* 405; *Sargent* agt. *The State*, *11 Ohio Rep.* 472; *The State* agt. *Engle*, *13 id.* 490.) The old rigid rules, in regard to keeping juries "without meat or drink, fire or candle," and that authorized the judge to have them carried from circuit to circuit, until they were all agreed, have been greatly relaxed.

Judge *HITCHCOCK*, in *Sutliff* agt. *Gilbert*, says, the most common practice of the courts of Ohio was to direct the jury, if the court should not be in session, when they have agreed, to put their verdict under seal, and bring it in at the opening of the court. He further says, "In thus far relaxing ancient rules, we have experienced no inconvenience, and I have no doubt we might go further without any danger; for I believe the more confidence is placed in jurors, the more they are treated like reasonable men, the more will right and justice, through their instrumentality, be done."

In this case it is further insisted, that the judge could not direct the sheriff to convey his instruction to the jury; but that he should have had the jury come back into court, and should there have given them the direction in person to seal their verdict.

The strict rule laid down in *Sargent* agt. *Roberts*, (*1 Pick. Rep.* 337,) perhaps, required the judge to call the jury back into the court-room, and there personally direct them to seal their verdict. That case differed from this. The judge, in that case, had adjourned the court, and he then wrote a letter to the jury respecting the cause that had been committed to them; and for that cause the verdict was set aside, although there was nothing exceptionable in the letter itself.

There is no pretence in this case that the sheriff said anything more to the jury than that the judge had directed that they might seal their verdict when they agreed on one. If

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this was technically irregular, it is not a sufficient cause for disturbing the verdict. It is not every trifling irregularity that will warrant the court in setting aside verdicts. (2 *Cow.* 589; 1 *Hill*, 207.)

It is also claimed that each juror should have signed the verdict before they separated. This they should have done; but it was merely a technical irregularity, which was cured, as well as the supposed one committed by the judge in giving the direction to the jury, to seal their verdict, through the sheriff, by the plaintiff's counsel not objecting to the reception of the verdict, when it was delivered in his presence, at the opening of the court the morning after it was agreed upon by the jury. (*Douglass* agt. *Toucey*, 2 *Wend.* 352; *Bunn* agt. *Hoyt*, 3 *Johns.* 255; *Gra. Pr.*, 2d ed., 316.)

It is also argued, that two of the jurors did not agree to the verdict delivered by their foreman, because, when they were polled, one only said, "I consented to it," and the other, "I agreed to it." This allegation is contradicted by two of the jury, which is enough to balance the recollection of the clerk, whose duty it was to ascertain and declare, if all of the jury agreed to the verdict as rendered. (4 *Com.* 549 and 550.) If the two jurors made answer in the precise language the clerk swears they did, it raises a strong presumption that they then assented to the verdict as the clerk had recorded it. Had they then desired to dissent therefrom they would probably have so stated; at least it is reasonable to infer they would have done so. If they did not then agree to the verdict as delivered to the court by their foreman, such fact should have been ascertained on the spot; and the jury should have been sent out again, to further deliberate. The non-attention of the plaintiff's counsel, who was present, to what was being done, is no excuse for his not then ascertaining whether the verdict, as recorded by the clerk, was agreed to by all of the jury. His inattention was the plaintiff's misfortune, if the plaintiff sustained any injury thereby.

The fact that the verdict was delivered, and that the jury was polled at the request, and in the presence of the counsel

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for the unsuccessful party, and that the verdict was entered without his objection, and without any intimation from the clerk that the jury did not all agree to it, is such strong and controlling evidence of it being the verdict of each of the twelve jurors, that nothing short of proof, that an actual fraud was practiced on the court and the counsel for the unsuccessful party, by the opposing party, or some one in his interest, or by the clerk, in procuring the verdict to be delivered and entered when it was not agreed to by the entire jury, should be allowed to disturb it.

To allow verdicts to be set aside upon the mere recollection of the clerk, inconsistent with his duties, or upon that of other persons, which show him at least guilty of negligence in his official trust, that some of the jurors, when asked if the verdict delivered by their foreman was their verdict, answered, "I consented to it," or, "I agreed to it," would open a door for abuses more intolerable than for parties to submit to verdicts that are only agreed to by a majority of the jury. Such a practice would tend to substitute the uncertain memories of individuals for the unchanging records of the courts. It had better be discountenanced.

The motion to set aside the verdict in this action is denied, with \$10 costs.

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SUPREME COURT.

ABBIE M. STEWART agt. THE SARATOGA & WHITEHALL RAIL-ROAD COMPANY.

An *appeal* to the general term, from an order under § 349 of the Code, is *per se* a stay of proceedings; and no undertaking or security is required. (*This agrees with Emerson agt. Burney, 6 How. Pr. Rep. 32—and Trustees of Penn Yan agt. Forbes, 8 id. 285.*)

Saratoga Special Term, April, 1856.

MOTION to stay proceedings of plaintiff to assess damages on writ of inquiry to sheriff of Saratoga county.

At a special term in March, 1856, the demurrer of the defendant was overruled, on argument, with liberty to defendant to answer over, on payment of costs, within twenty days. The order which overruled the demurrer, proceeding—"If the defendant shall fail to pay the costs and to answer within twenty days, then the plaintiff's damages to be assessed by a jury; and that a writ of inquiry issue," &c.

Twenty-two days after service of a copy of this order, the defendant served notice (under § 349 of Code) of an appeal from this order, and on the same day (April 12th) received notice that plaintiff would, on April 21st, proceed to assess damages by a jury, on a writ of inquiry.

On the 17th day of April, plaintiff's attorneys served a notice of argument of the appeal, and continued to proceed to prepare for the assessment of the damages, until, on the 21st of April, they were served with the affidavit and stay of proceedings, for the making of this motion.

Defendant claims that this motion should be granted, without terms, as the appeal from the order overruling the demurrer was *per se* a stay of proceedings of plaintiff.

Plaintiff claims that the appeal was *not* a stay of proceedings; and that, if this motion is to be granted at all, it should be on payment of costs, preparing to attend trial before sheriff's jury,

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\$7, sheriff's fees \$1.50, subpoenaing two witnesses and attendance \$1, postage and affidavits 50 cents—in all, \$10, and \$10 costs of the motion.

E. F. BULLARD, *for plaintiff.*

A. POND, *for defendant.*

GOULD, Justice. There have been conflicting decisions, at various special terms, as to the operation of *appeals from orders*; which are referred to in 11 *How. p.* 572. Some of those cases are on orders not analogous to the one in question. But the decision of the case in 11 *Howard*, 572, is almost precisely of the case before me.

In this conflict of decisions, I may be at liberty, with all deference for the learning and ability of the judges who have given them, to say that, in cases like this, I am at a loss to understand the necessity for *any stay of proceedings*. It is true, that Mr. Justice BOWEN, in the case last cited, says; "After the expiration of the twenty days given to the defendant to answer, the plaintiff *might have* perfected his judgment, based on the order appealed from. *Had judgment been perfected before the appeal was taken*, the appeal must necessarily have been from the *judgment*;" and would not have been a stay, unless the provisions of the Code for that purpose had been complied with. No doubt the plaintiff *might* have done so; *but he did not*; and the *judgment* is *not* perfected; and the appeal is *not from the judgment*. And it appears to me that the reasoning fails to support the decision; and that it is not the policy of the law, or the practice of the courts, even to allow a respondent to proceed in a particular way at the *peril* of having his proceedings useless, *where there is a legal and sufficient reason why he should not proceed at all*, in that direction.

That there is such a reason, in this case, will (it seems to me) become very apparent, if, instead of going off on the point whether the appeal be *per se* a *stay*, we simply ask *where the parties are*, after the order and before the appeal is taken? There is no issue of fact in the case: there is no default for not

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pleading ; but there is *an excuse for not answering* the plaintiff's averments of fact ; and one which, in *form*, is a valid excuse ; so that, even on overruling it, *there is no judgment* whatever, either *final* or *conditional*; but simply an order that the demurrer be overruled, (*i. e.* decided not to be well taken,) "with liberty to the defendant to answer, on payment of costs, within twenty days from service of copy of this order."

Supposing this order not to be appealed from, the defendant had the right to make up for trial issues of fact, on which to have the merits of the case decided.

Or, within thirty days he had the right to appeal. He has done so ; and where does that act place him ? He appeals from the *whole* order, not from a part ; and he *suspends that order—stays it* at any rate. In effect, he *renews his demurrer*. He says, there is not only a reason why you cannot proceed to assess any damages against me, but there is a legal reason—a reason founded in the *inherent defects of your own complaint—why I am entitled to judgment against you, without answering you at all*. I take, as a *right*, this *issue of law*; and, until that be decided, finally, *there is no such thing as your proceeding to try, in any way, any issue of fact, or in any way to get judgment against me on the merits*. I have no *stay* of proceedings against you—and wish none. You are at full liberty to *proceed*; but you must proceed with the issue of law which is in the case, and not with issues of fact that are not in it—or with any inquiry of damages to which you *may* never be entitled; and to which you *cannot* be entitled until I have had an opportunity to try the *facts* of the case. And as to the provision of the order that, unless I pay costs, and answer within twenty days,—(though well enough, did I not appeal,)—the *mere fact* that, within the time allowed me by law, I do appeal, makes the provision a *nullity*. It must be a *nullity*; because it is *against the law*, which law (*Code*, § 349) says, that I may appeal from, and take away, the *entire basis* on the strength of which the judge imposed his condition ; and (*Code*, § 172) says that, even after the decision of my demurrer against me at the

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general term, *that court* may allow me to plead over; and of course it may do so without reference to your condition.

The cases heretofore decided note the absurdity of *giving security* to stay proceedings on an appeal from an order overruling or sustaining a mere demurrer. But the judges have felt constrained, by the words of the Code, to decide in favor of such absurdity, unless dispensed with by special order of the court.

The reasons above seem to me to save the law makers from the charge of having left the absurdity in the act.

There is a difference in the time fixed by *the law* for an appeal, and that fixed by *the courts* for answering over, which (if my views, above set forth, be sound) it were well should be in some way done away with; so that there should be the *same* time allowed for answering as for appealing, and then none of these anomalous conditions would arise—cases where both parties appear to be regular, but where, after all, the paramount *right of appeal* must prevail over the conditions of an order.

The motion must be granted, but without costs to either party.
Ordered accordingly.

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SUPREME COURT.

HUGH SWIFT agt. FELIX FLANAGAN.

At common law, it was unnecessary, at any time while the parties were living, to proceed by *scire facias* to obtain *execution* of a judgment, if the first writ of *fi. fa.* had been issued in time—that is, within one year and a day. In this state, the time for the issuing the first writ was extended to *two years* from the filing of the record. (2 R. S. 363, § 1.)

Under the Code, an execution may be issued, of course, at any time within *five years* after the entry of judgment; but after five years from the entry of judgment, no execution can be issued, *without leave of the court, on motion*, whether there has been an *execution issued previous* to that time or not. Proceedings in the nature of *scire facias* are no longer necessary.

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Albany Special Term, Sept., 1855.

MOTION to set aside execution.

On the 7th of July, 1848, the plaintiff recovered a judgment against the defendant, upon which, on the 7th of September following, an execution was issued to the sheriff of Albany, which was returned unsatisfied. On the 25th of August, 1855, the plaintiff issued another execution upon the same judgment, which the defendant moved to set aside, on the ground that more than five years had elapsed since the recovery of the judgment.

N. G. KING, *for plaintiff.*

L. D. HOLSTEIN, *for defendant.*

HARRIS, Justice. At common law, a party who had recovered a judgment might, within a year and a day after the judgment had become final, issue a *fieri facias* to the sheriff of the county in which the venue had been laid. Upon the return of this writ unsatisfied, an *alias fieri facias* might be issued to the same sheriff, or a *testatum fieri facias* to the sheriff of a different county. After the *alias fieri facias*, a *pluries fieri facias* might be issued as often as necessary. These various writs were connected with the first by continuances entered upon the record. Such continuances were not, in fact, entered when the writs were issued, for the reason that the entry might be made afterwards, even after objection taken, so as to cure the irregularity. It was unnecessary, therefore, at any time, while parties to the judgment were living, to proceed by *scire facias* to obtain execution of a judgment, if the first writ of *fieri facias* had been issued in time. In this state the time for issuing this first writ was extended to *two years* from the time of filing the record of the judgment. (2 R. S. 368, § 1.)

But the Code has essentially changed the practice in respect to executions. The different kinds of writs known to the common-law practice are no longer to be used. A judgment which requires the payment of money is now to be enforced only by execution. Such execution may be issued to the sheriff of any

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county where the judgment has been docketed. Its form and tenor are prescribed by the 289th section of the Code. It may be issued, of course, at any time within five years after entry of the judgment; and after that period by leave of the court. Proceedings in the nature of *scire facias*, to obtain execution, are no longer necessary in any case.

I am aware that in *Pierce agt. Craine*, (4 How. 257,) the common-law fiction of keeping the execution alive by the entry of continuances, was allowed to prevail, so as to sustain an execution issued more than five years after the entry of the judgment, and that in *M'Smith agt. Van Deusen*, (9 How. 245,) my brother PARKER appears to have concurred in this practice. But I can find nothing in the provisions of the Code relating to execution, which can be construed to warrant the issuing of execution in any case after five years from the entry of the judgment, without first having obtained leave for that purpose.

The 284th section declares that, "after the lapse of five years from the entry of the judgment, an execution can be issued only by leave of the court, upon motion. The process which the defendant seeks to set aside is an *execution*. It was issued after the lapse of five years from the entry of the judgment. It was issued without leave of the court. It was, therefore, issued without authority, and not the less so because another execution had been regularly issued within the time prescribed by the 283d section of the Code.

This view of the question is sustained by the decision in *Currie agt. Noyes*. (1 Code, R. N. S. 198.) In that case the motion was to set aside an order for the examination of the judgment-debtor upon proceedings supplementary to execution. The judgment had been recovered and execution issued thereon more than five years before the order was obtained. The motion was granted. MITCHELL, J., said, "Under the Code, no execution can issue without leave of the court after five years from the entry of the judgment, even if an execution had once issued within the five years; and as the Code would not allow an execution to issue in such a case, it cannot be that it was intended to allow an order in the same case, which was to be

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only in aid of the execution." This decision, though made at a special term, was subsequently affirmed by the general term, upon appeal.

The motion to set aside the execution must be granted; but as the practice in such cases has been unsettled, the plaintiff should not be charged with the costs of the motion.

SUPREME COURT.

JULIUS T. ANDREWS agt. GEORGE V. SHAFFER, CHRISTINA SHAFFER and others.

The requirement of a *private examination*, apart from her husband, of a married woman, in order to render a conveyance by her valid, is confined by the Revised Statutes, to a "married woman residing within this state." (1 R. S. 758, § 10.)

Where, in a foreclosure case, it does not appear where the wife of the mortgagor resided when she executed the mortgage, her *private examination*, on proving the execution of the mortgage, is unnecessary.

At all events, the validity of such an execution (without a *private examination*) is good under the laws of 1849, (*Sess. Laws* 1849, Ch. 375,) which declares that any married woman may convey and devise real and personal property, and any interest or estate therein, and the rents, issues and profits thereof, in the *same manner*, and with the like effect, as if she were *unmarried*, &c.

Cayuga Special Term, Nov., 1855.

THIS was an action to foreclose a mortgage, executed by the defendants George V. Shaffer and Christina Shaffer, his wife, dated January 29th, 1852, given to the defendant Martha Millard, and assigned by her to the plaintiff, who, with the defendant Samuel R. Millard, guarantied its payment. The mortgage was given to secure a portion of the purchase price of the mortgaged premises, which consisted of a tract of eighty-eight acres of land in the town of Waterloo, Seneca county, and which, on the same day, had been conveyed by said Martha Millard to the said Christina Shaffer.

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The complaint showed that the mortgage was executed by the defendants George V. and Christina Shaffer, in presence of Samuel R. Millard, who thereupon subscribed the same as a witness, and the mortgage was delivered to him as the agent of said Martha Millard. The execution of the mortgage by both mortgagors was afterwards proved by the subscribing witness before a justice of the peace, and recorded in the office of the clerk of Seneca county. Its execution by the defendant Christina Shaffer was not acknowledged in pursuance of § 10 of Chap. 8 of Part II. of the Revised Statutes. (1 R. S. 758.)

The complaint contained the usual prayer for judgment of foreclosure and sale, and that the defendant Christina Shaffer be required to acknowledge the execution of the mortgage before a proper officer, upon a private examination apart from her husband, to have been done freely, and without any fear or compulsion of her husband.

The defendant Christina Shaffer demurred to the complaint on the ground, among others, that it did not state facts sufficient to constitute a cause of action.

DAVID WRIGHT, *for defendant Christina Shaffer.*

E. PESHINE SMITH, *for plaintiff.*

WELLES, Justice. I am of the opinion that the plaintiff is entitled to judgment on the demurrer, for the following reasons:—

1st. It does not appear that Christina Shaffer, at the time she executed the mortgage, was residing in this state. The requirement of a private examination, apart from her husband, of a married woman, in order to render a conveyance by her valid, is confined by the Revised Statutes to a "married woman residing within this state." (1 R. S. 758, § 10.) "Every person capable of holding lands, (except idiots, persons of unsound mind and infants,) seized of, or entitled to, any estate or interest in lands, may alien any such estate or interest at his pleasure, with the effect, and subject to the restrictions and regulations provided by law." (*Id.* 719, § 10.) This section embraces all persons, except idiots, persons of unsound mind, and in-

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fants—as well married women as others. To bring the case within the restriction provided in § 10, on page 758, the fact should appear that Christina resided in this state at the time she executed the mortgage in question, as it is only in that case that a private examination is necessary.

2d. If any doubt exists as to whether it must appear where the married woman resides at the time she executes a conveyance, in order to bring the case within the section last cited, there can be none, I think, of the validity of Mrs. Shaffer's mortgage in this case, under chapter 375 of the Session Laws of 1849, which declares that any married woman may convey and devise real and personal property, and any interest and estate therein, and the rents, issues and profits thereof, in the same manner, and with like effect, as if she were unmarried, &c. (*Laws of 1849*, p. 528; *Blood agt. Humphrey*, 17 *Barb. S. C. R.* 660.) The conveyance by Christina Shaffer was, therefore, good and valid, certainly against her, and she is the only party objecting.

It is not important to consider, whether, under the act of 1849, any different form of acknowledgment is required from a married woman than from any other person. It is sufficient for all the purposes of this case, that she may convey in the same manner, and with the like effect, as if she were unmarried.

It is not necessary to consider the other objections taken by the demurrer to the complaint. That the prayer of the complaint is too broad, or embraces too much, is not among the causes for which a defendant may demur. (*Code*, § 144.) What judgment the plaintiff may be entitled to, will be an after consideration. Nor is surplusage in a complaint a ground of demurrer.

The plaintiff must have judgment on the demurrer, with leave to the defendant Christina Shaffer to answer, on payment of costs.

Wake agt. Hart.

SUPREME COURT.

WAKE agt. HART.

A regular foreclosure and sale of mortgaged premises will not be set aside because the newspaper in which the notice of sale was published was not well calculated to give that general information which, in such cases, should be afforded.

New-York Special Term, July, 1855.

MOTION to set aside foreclosure and sale of mortgaged premises.

L. BIRDSEYE, *for plaintiff.*

JOHN VAN VLECK, *for defendant.*

COWLES, Justice. The foreclosure sale, in this case, was regular in all respects, although the paper in which the notice of sale was published was not well calculated to give that general information which in such cases should have been afforded. But there is nothing to impeach the title of the purchaser, while there would be great difficulty in devising a mode by which he could be indemnified in case the sale were now set aside. In order to insure, as a general rule, good prices under foreclosure sales, the sales should not be set aside except for good and substantial reasons. Otherwise, purchasers at such sales would be deterred from bidding.

For these reasons, and as no party now offers to take the premises at an advanced price upon the original bid, the motion to set aside the sale must be denied, but without costs to either party.

Carswell agt. Neville.

SUPREME COURT.

WALTER CARSWELL agt. JULIAN NEVILLE.

If a non-resident defendant, within one year from the entry of judgment, is allowed to come in and defend, that fact of itself does not open the judgment, nor stay proceedings upon the execution.

But a third person asking to come in and defend or contest the plaintiff's claim, must do so *before judgment*.

New-York Special Term, Dec., 1854.

MR. MAN, *for motion.*

H. C. VAN VORST, *opposed.*

MORRIS, Justice. In this case Mr. Man presented to me two petitions, one of them signed by Mr. Man as the attorney for the defendant in this suit; and the other as the attorney for Greenbury Dorsey, an attaching plaintiff in another suit against the defendant in this suit.

These petitions ask for an order directing the plaintiff to show cause why Neville, the defendant, should not be let in to defend this suit; and for an order compelling the plaintiff to make Greenbury Dorsey a defendant in this suit, to enable him to litigate plaintiff's claim against Neville in this suit, and his lien upon the property attached by him.

Neville being a non-resident, and the judgment not having been perfected against him for more than a year, the Code permits him to come in and defend, upon presenting a proper case. If he should be let in to defend, that fact does not of itself open the judgment or stay proceedings upon the execution. I have, therefore, on Neville's application, granted the order to show cause.

Should Dorsey be made defendant, it would open the judgment and stay proceedings upon it. He is too late for such a

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favor. The case in 3d *Code Reporter*, 172, relied upon by Dorsey's counsel, is where the application was made before judgment. In this case, Dorsey attached as early as February, 1853, and the plaintiff in this suit recovered judgment in August, 1854.

I refuse Dorsey's application.

SUPREME COURT.

D. BURR WHEELER agt. JOHN LOZEE.

It is not material to the adverse party, whether the witnesses opposed to him attend in obedience to a subpoena or by agreement, as there is now no fee for the service of a subpoena.

Witnesses are entitled to their fees from the party at whose instance they attend, whether they are subpoenaed or not.

And it is not necessary that it should be proved to the clerk, on the adjustment of costs, that the witnesses were subpoenaed.

Where no subpoena is used by a party to procure the attendance of his witnesses, persons whose fees he seeks to charge to his adversary must be *his witnesses*, in the action. And where no subpoena is served on them, they cannot be considered his witnesses unless they were examined as such, or attended the trial as his witnesses, at his request, or by agreement; such request or agreement must be stated in terms in the affidavit of their attendance, or be clearly inferable therefrom.

A witness residing out of the state is entitled to fees for the number of miles he travels from the boundary line within the state to the place of trial. This distance should be estimated by the nearest usually travelled route. And due regard should be had to his residence in the foreign state, and the place where, by the usually travelled route, he would come to the state line. And these facts should be stated in the affidavit used on taxation.

If a foreign witness travels from his residence to the place of trial *for the purpose* of attending as a witness, he may then be subpoenaed, and his travel fees will be allowed as a foreign witness. Otherwise, if he attends the trial not for the purpose of being a witness, although he is subpoenaed at the trial.

The party must show, by affidavit, the name and place of residence of each of his witnesses; the distances they severally resided from the place of trial, according to the usually travelled route; and the number of miles they respectively

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travelled *as such witnesses*, for the purpose of going to the place of trial and returning therefrom, and that they were material and necessary, or that the party believed them to be so. If any witness is subpoenaed at a temporary residence, that fact should be stated.

Madison General Term, May, 1856.

Present, SHANKLAND, GRAY and BALCOM, Justices.

THIS was an action tried before a referee at Ithaca, who made a report for the defendant. On the adjustment of the defendant's costs by the clerk of Tompkins county, the plaintiff objected to the clerk allowing the defendant fees for Charles Rockwell and Ezra Lozee, travelling 273 miles each, as witnesses in the action. It was shown they resided in Ohio, and that each of them attended one day as a witness for the defendant before the referee. The defendant's affidavit stated they actually travelled within this state *in order to attend said trial* the distance aforesaid; and that they were necessary and material witnesses for the defendant on the trial of the action, as he was advised by J. A Williams, Esq., of Ithaca, his counsel, and verily believed; but the defendant did not state that said Rockwell and Lozee attended before the referee as such witnesses in obedience to a subpoena or at his request.

It was further proved to the clerk, by the affidavit of the law partner of the defendant's attorney, that Rockwell was examined as a witness for the defendant on the trial; that the defendant was advised of the materiality of said Rockwell and Lozee, and of the necessity of procuring their attendance; that between the time of noticing the cause for trial and the time of trial, there was not sufficient time to take their testimony by commission; that the defendant was so advised by his attorney.

The grounds of the objection to the allowance of travel fees for said witnesses, were, that before fees for travel can be taxed it must appear, by affidavit, that the witnesses were subpoenaed or at least attended the trial on request; that the distance was overcharged from the boundary line of this state, and that it did not exceed 250 miles from the state line to Ithaca.

The clerk disallowed the charge for travel fees of said wit-

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nesses. The defendant appealed to the Tompkins special term, where the affidavit was held sufficient to authorize the allowance of such travel fees, and the decision of the clerk was reversed, and a re-adjustment of the costs was ordered.

The plaintiff appealed from the decision at the special term to the general term.

SAMUEL LOVE, for plaintiff.

BRUYN & WILLIAMS, for defendant.

By the court—BALCOM, Justice. The process of subpoena is given to a party to enable him to *compel* the attendance of his witnesses at the trial; but there can be no absolute necessity for using such process when witnesses will voluntarily attend without it. As matter of prudence, parties should subpoena their witnesses; but it cannot be material to the adverse party whether the witnesses opposed to him attend in obedience to a subpoena or by agreement, as there is now no fee for the service of a subpoena. (*Jackson* agt. *Hoagland*, 1 *Wend.* 69; *Willink* agt. *Reckle*, 19 *id.* 82.)

Witnesses are entitled to their fees from the party at whose instance they attend, whether they are subpoenaed or not. The non-service of a subpoena would be no defence for the party when sued by a witness for his fees, who had attended as his witness at his request. Nor is it possible to perceive how the want of a subpoena can relieve the unsuccessful party from the payment of the fees of his adversary's witnesses. There is nothing in the statute that countenances such a proposition. (*Laws of 1840*, p. 331, § 8; *Hurd* agt. *Swan*, 4 *Denio*, 79.) It is not necessary that it should be proved to the clerk, on the adjustment of costs, that the witnesses were subpoenaed. (*Code*, § 811; 2 *R. S.* 653, § 7.)

When no subpoena is used by a party to procure the attendance of his witnesses, persons whose fees he seeks to charge to his adversary must be *his witnesses* in the action. And where no subpoena is served on them, they cannot be considered *his witnesses*, unless they were examined as such, or attended the

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trial as his witnesses, at his request or by agreement, such request or agreement must be stated in terms in the affidavit of their attendance, or be clearly inferable therefrom. The 311th section of the Code says, "The disbursements shall be stated in detail, and verified by affidavit." This section is not in conflict with the former statute prescribing what the affidavit of the attendance of witnesses shall contain. (2 R. S. 653, § 7.)

A witness residing out of the state is entitled to fees for the number of miles he travels from the boundary line within the state to the place of trial. (*Howland* agt. *Lenox*, 4 John. 811; *Hinds* agt. *Schenectady County Mutual Insurance Co.*, 7 How. Pr. R. 142.) This distance should be estimated by the nearest usually travelled route, from the boundary line of the state to the place of trial, by the usual modes of public conveyance. (*Wilkie* agt. *Chadwick*, 18 Wend. 50.) Due regard should be had to the residence of the witness in the foreign state, and the place where he would come to the state line by the usual mode of public conveyance in travelling from his residence to the place of trial. He should not be required to travel a shorter route, on which there is no public conveyance, nor would he be justified in going an unreasonable distance round for the sole purpose of finding a public conveyance. Reasonableness in the application of the rule is what should be required.

The affidavit in this case fails to show in what part of Ohio the witnesses resided, or where they came into this state, or where they would have crossed the state line by the most usual travelled route. (4 Hill, 595.) The affidavit is defective according to the construction put upon the statute both before and since the Code.

It has been held that a foreign witness who was subpoenaed at the place of trial, was not entitled to travelling fees. (*Bank of Niagara* agt. *Austin*, 6 Wend. 548; 6 How. Pr. R. 410.) This rule should be confined to cases where the foreign witness has not travelled from his residence for the purpose of attending the trial as a witness, but was at the place of trial for some other purpose.

In *Ehle* agt. *Bingham* (4 Hill, 595,) it was held, the affidavit

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must state, the name and place of residence of each witness, and the distance travelled by him to reach court. In *Logan agt. Thomas*, (11 *How. Pr. R.* 161,) Mr. Justice Bowen said the affidavit should state that the witnesses travelled from their residences to the place where the trial of the cause was had, *for the purpose of attending as witnesses*. The decision in *Schermerhorn agt. Van Voarst* (5 *How. Pr. R.* 458) is to the same effect.

In this case it does not appear that the witness, Lozee, was sworn. As he was not subpoenaed, the party should make a clear case to entitle him to his fees. (6 *Hill*, 376; 6 *How. Pr. R.* 410; 19 *Wend.* 82.) The materiality of both witnesses was sufficiently established. (*Dean agt. Williams*, 6 *Hill*, 376.)

The just and true conclusion to be drawn from all the decisions, is that the party must show by affidavit; the name and place of residence of each of his witnesses; the distances they severally resided from the place of trial, according to the usually travelled route, and the number of miles they respectively travelled *as such witnesses* for the purpose of going to the place of trial, and returning therefrom; and that they were material and necessary, or that the party believed them to be so. If any witness is subpoenaed at a temporary residence, that fact should be stated. (*Clark agt. Staring*, 4 *How. Pr. R.* 248.)

Applying these rules to the proof of attendance of the witnesses in this action, the same was insufficient to authorize the allowance of the travel fees charged for Rockwell and Lozee.

The order made at the special term is, therefore, reversed.

The defendant has leave to re-adjust his costs before the clerk of Tompkins county, and either party may use new affidavits on such re-adjustment; but no costs of the motion for re-adjustment, or on the appeal to the general term, are allowed to either party.

Theriot and another, executors, agt. Prince.

SUPREME COURT.

THERIOT and another, executors, agt. PRINCE.

The *legal representatives* of a deceased plaintiff, in an action of *tort*, are not personally, nor in their representative capacity, liable for *costs*, either under the Revised Statutes, or the Code, where judgment was given for defendant on the second trial—the suit having been commenced before the Code, and resulting in favor of the plaintiff on the first trial, during his lifetime.

New-York Special Term, March, 1855.

THIS action, which was in *trover*, was commenced in 1844 by the testator—was tried in his lifetime, and verdict for \$900 in his favor.

After his death, and in January, 1847, the suit was revived in the names of the plaintiffs. In October, 1847, the court set aside the verdict, and ordered a new trial. In 1851, it was referred; and in March, 1852, the referee reported in favor of the defendant.

The defendant now moves for costs against the plaintiffs personally, and for an extra allowance.

P. CALLAGHAN, for defendant.

JOHN J. TYLER, for plaintiffs.

COWLES, Justice. There is nothing which would justify the court, had it the power, in this case, in requiring the defendant's costs to be paid by the plaintiffs personally.

They proceeded, and evidently in good faith, with a suit in which the testator had recovered a verdict in his lifetime. They could have hardly justified themselves had they done less.

The plaintiffs not being personally liable, can costs be allowed, payable out of the testator's estate?

The defendant claims them under the § 817 of the Code. But that section is modified by § 8, which provides that Part

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II. of the Code relates to actions commenced "after the first day of July, 1848, except when otherwise provided therein."

This action having been commenced before the Code took effect, the costs must be fixed, and all questions respecting them determined by the law as it existed on the 1st July, 1848, unless it is otherwise provided in the Code itself.

It is not so "otherwise provided," unless by § 459. But that section appears to have been designed to regulate the mode of conducting the action. It regulates the "proceedings," not the costs, except such as may arise on appeal.

Such was the construction given to § 459 by DUER, J., in *Rich agt. Husson*, (11 *Legal Observer*, 119,) and I concur entirely in his reasoning in that case. (*Voorhies' Supplement to Code*, p. 196.)

The defendant, then, cannot recover his costs under the Code. Can they be allowed under the Revised Statutes?

By 2 R. S. p. 15, §§ 16, 17, costs could not be allowed against personal representatives necessarily prosecuting in the right of their testator, or intestate, unless for wantonly bringing the suit, &c., &c., which is not the case here. Indeed, it was admitted on the argument, that costs were not recoverable under the Revised Statutes; and I am equally clear that they cannot be allowed under the Code.

Motion is therefore denied, but without costs.



SUPREME COURT.

GILBERT N. MARSHALL agt. GEORGE G. ROCKWOOD.

In an action by the *payee* of a promissory note, against the *maker*, it is necessary in the complaint, only to set out a copy of the note, with an allegation that a specified sum is due the plaintiff thereon. Section 162 of the Code, makes such a case equivalent to an allegation of the execution and delivery of the note by the defendant to the plaintiff.

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Rensselaer Special Term, June, 1855.

DEMURRER to complaint.

The action was brought by the payee of a note against the maker. The complaint contained a copy of the note, as follows:—

“Troy, Oct. 11, 1854.—Four months after date, I promise to pay to the order of G. N. Marshall, three hundred dollars, at the Farmers' Bank—value received.

\$300.

G. G. Rockwood.”

And averred that there was due to the plaintiff thereon the sum of \$300, with interest from the 14th day of February, 1855, for which sum the plaintiff claimed judgment.

To this complaint the defendant demurred, and alleged, for cause of demurrer, that it did not state facts sufficient to constitute a cause of action.

JOHN FITCH, *for plaintiff.*

A. A. LEE, *for defendant.*

HARRIS, Justice. The last clause of the 162d section of the Code, declares that, “in an action founded upon an instrument for the payment of money only, it shall be sufficient to give a copy of the instrument, and to state that there is due to the plaintiff thereon a specified sum, which he claims. This is such an action. It is founded entirely on an instrument for the payment of money only; and the plaintiff has, in his complaint, brought himself within the very letter of the provision cited. Had there been no such provision, it would have been enough for the plaintiff to have given, in his complaint, a copy of the note, and alleged that the defendant made the note and delivered it to him. (*Chappell agt. Bissell*, 10 How. Pr. R. 274.) This is all that the 142d section of the Code requires.

The legislature, as I understand the provision referred to, authorized the plaintiff, instead of making such allegations, to give a copy of the instrument, and state how much was due

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thereon. But where other facts are necessary to make out the cause of action, such other facts must be alleged. Thus, in *Lord* agt. *Cheesebrough*, (4 *Sand.* 696,) the action was by the endorsee of a promissory note against the maker. It was, of course, necessary, not only to prove the note, but also its transfer and delivery to the plaintiff. It was very properly held, that the provision in the 162d section of the Code did not dispense with the averment of these additional facts constituting a part of the plaintiff's cause of action. So in *Alder* agt. *Bloomingdale*, (1 *Duer*, 601,) the action was against the endorsee of a promissory note. The complaint contained no averment of the demand of payment of the note, or notice to the endorsee. This, upon demurrer, was held to be a fatal defect. The action, in that case, was founded partly upon the note, a copy of which had been given, and partly upon extrinsic facts, which had not been alleged in the complaint. (See, also, *Bank of Geneva* agt. *Gulick*, 8 *How. Pr. R.* 51.)

In the case under consideration, the plaintiff relies upon no facts not appearing upon the face of the instrument itself, to constitute his cause of action. The note, of which he has given a copy, when produced upon the trial and proved, will, of itself, furnish him with *prima facie* evidence of his right to recover the amount alleged to be due thereon, and the defendant's liability. To such a case, and such a case only, the provision in the 162d section of the Code applies. In such a case, the giving of a copy of the instrument, with an allegation that a specified sum is due thereon, is made equivalent to an allegation of the execution and delivery of such instrument by the defendant to the plaintiff.

The plaintiff is, therefore, entitled to judgment upon the demurrer.

Gilbert, jr., and others, agt. Cram.

SUPREME COURT.

JOSEPH J. GILBERT, JR., and others, agt. THOMAS W. CRAM.

Where the complaint avers, in an action on contract, the sale and delivery of a bill of goods on a certain day, whereby the defendant is now indebted, &c., and the answer avers, that they were purchased on a credit of six months, and that the credit has not expired, it is not new matter in the answer requiring a reply, but a *special denial* that the defendant is indebted, as alleged in the complaint.

New-York Special Term, April, 1855.

MOTION to strike out plaintiffs reply.

BENJAMIN GALBRAITH, *for motion.*

DANIEL GRAY, *opposed.*

MORRIS, Justice. The complaint is in assumpsit for goods sold and delivered on the 12th of October, 1854, and avers, "That thereupon the defendant is now indebted to the plaintiffs in, and the plaintiffs demand judgment against the defendant for \$523.05, with interest thereon from October 12th, 1854."

The answer of the defendant admits the purchase of the goods, &c., and avers they were purchased upon a *credit of six months, and that the credit had not expired.*

This allegation in the answer is not "A statement of *new matter constituting a defence,*" but is merely a special denial of the plaintiffs' allegation, that "the defendant is now indebted to the plaintiffs"—a denial of the *contract set up by the plaintiff.* New matter is where the contract is admitted, and the matter set up *avoids* the contract—not where the matter set up *denies* the contract.

The plaintiffs were not entitled to reply to the defendant's answer. The reply is, therefore, irregular, and must be stricken out, with costs.

The facts pleaded by the plaintiffs in their reply, should have

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been stated in their complaint, and then the defendant would have had an opportunity to deny them.

If the plaintiffs desire, they may amend their complaint upon paying defendant \$10 costs of this motion.

SUPREME COURT.

EDWARD R. WILLIAMS agt. JOHN P. GARRETT.

If a warrant is not valid on its face, the justice who issues, and the officer who executes it, are liable for assault and battery, and false imprisonment, at the suit of the party arrested.

In an action for false imprisonment, the plaintiff may recover the actual expenses incurred by him in procuring his discharge by writ of *habeas corpus*, where the warrant of arrest was void on its face.

That the warrant, under which the defendant acted in enforcing the Prohibitory Law, was no protection. That every officer acting under a law which shall prove to be unconstitutional, is responsible for his acts as if they were performed without color of law.

Oneida Circuit, June, 1856.

R. H. MOREHOUSE, *for plaintiff.*

J. BENEDICT, *for defendant.*

BACON, Justice. This was an action against the officer only for assault and battery, and false imprisonment, and for searching and seizing the plaintiff's liquors, and also for the expenses incurred by the plaintiff in obtaining his discharge from arrest by *habeas corpus*. After proof of the plaintiff's case—

It was admitted that the defendant was a constable of the town of Deerfield, Oneida county, and that two warrants were delivered to him by Archibald Blue, a magistrate of the town, issued in the usual form, on the 11th day of March, 1856, one of which directed him to arrest the plaintiff, for violating the

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Prohibitory Law, and the other warrant commanded him to search and seize the plaintiff's liquors.

The defendant moved for a nonsuit on the ground,

1st. That the officer was protected by his warrant; that the action should have been brought against the magistrate, and not against the officer; that, under the law, a ministerial officer was protected by his warrant, and cited 21 Wend. 552; 24 id. 485; 5 Hill, 440.

2d. That there was no proof that the officer acted in bad faith or maliciously.

The motion was denied, and the justice charged that the warrants were no protection whatever, either to the officer or to the magistrate who issued them, and also charged that if a warrant is not valid on its face, the justice who issues, and the officer who executes it, are liable for assault and battery, and false imprisonment, at the suit of the party arrested—and the jury might award damages for plaintiff's actual expenses incurred in obtaining his discharge on the writ of *habeas corpus*, together with the actual value of the liquor seized and carried away by the defendant. But that the jury should not allow any vindictive damages or smart money, as there was no evidence that the defendant had been guilty of any bad faith in the proceedings against the plaintiff.

The jury assessed the damages at \$50.

SUPREME COURT.

GEORGE CATLIN agt. GEORGE S. DOUGHTY.

The former action by *judgment-creditor's bill* (2 R. S. 173, §§ 38, 39) is still in force, and may be resorted to, after execution returned unsatisfied, in whole or in part. The Code has not repealed the provisions of the Revised Statutes in reference to this action, except that portion which authorizes a *discovery*. That is, the allegations in the complaint must be positive that the debtor has

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property or interests in property, &c., not calling for a discovery thereof, but praying that the defendant be adjudged to apply such property to the payment of the judgment, &c.

Richmond Special Term, May, 1856.

THE complaint in this case is in the old form of a judgment-creditor's bill, after the return of an execution unsatisfied, except that it alleges positively that the defendant is interested in certain property, and particularly in ten or more shares of the capital stock of the Excelsior Fire Insurance Company, or of some other company, or that he has money deposited to his credit, or securities for money held in trust for him, or for his benefit; and that it does not pray a discovery, but that the defendant be adjudged to apply such property to the payment of the judgment, and be enjoined from disposing of it.

The defendant demurs, insisting that the Code abolishes this action, and leaves the plaintiff no remedy except by supplementary proceedings, unless the action is brought to remove some fraudulent obstruction to the execution of the judgment.

Wm. I. STREET, for plaintiff.

JOHN M. VAN COTT, for defendant.

MICHELL, Justice. The remedy by action is expressly given by the Revised Statutes, (2 R. S. 178, §§ 38, 39,) whenever an execution is returned unsatisfied, not only to obtain a discovery of property, but also to prevent the transfer by the defendant of any property, money, or thing in action, due to him, or held in trust for him, and to allow a decree for the satisfaction of the sum remaining due on the judgment out of any such property of the defendant. This part of the Revised Statutes, except so far as it allows of discovery by action, has not been expressly repealed, and remains in full force, and sustains the present action, unless the Code, by implication, repeals it.

Section 299 of the Code applies only to actions against third persons, not to those between the judgment-creditor and judgment-debtor only. It directs, that when a person alleged to have property of the judgment-debtor, and to be indebted to

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him, claims an interest in the property adverse to the debtor, or denies the debt, "such interest or debt shall be recovered *only in an action* against such person, or corporation, *by the receiver.*"

Section 296 had given power to the judge to order property of the judgment-debtor, in the hands of himself or of any other person, or due to the judgment-debtor, to be applied towards the satisfaction of the judgment. This is a summary authority to be exercised without action, and is broad enough to include even property claimed by third persons. To prevent the exercise of that summary power, when third persons made an adverse claim, the 299th section was framed, so as not to allow such property to be touched without an action. The word "only," there, is to be connected with its nearest consequent "action," and not with the more remote word *receiver*, so as to read, "shall be recoverable only in an action (*i. e.* not by order of the judge) against such person or corporation by the receiver. It thus authorizes an action by the receiver, and prohibits a summary order where third persons are concerned, and does not, even in those cases, take away the plaintiff's right to an action, if formerly he had such right. (See *Goodyear agt. Betts*, 7 *How. Pr. Rep.* 187.)

There is nothing in the chapter of the Code as to "proceeding supplementary to execution," which shows that it was intended to do away with the old remedy by action. It is limited in its application, and cannot be effectual against the debtor himself, unless he resides in the state, or can be served with the order here. If an action is instituted, he may be proceeded against by publication.

It was said, that the Code allows a receiver after judgment and execution returned unsatisfied, only when the judgment-debtor refuses to apply his property in satisfaction of the judgment. It does allow the receiver, in that case, and also "in such other cases as may be in accordance with the existing practice." (§ 244, *sub. 5.*) Besides, the present question is not whether a receiver shall be appointed. If the defendant is

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willing to apply his property in satisfaction of the judgment, no receiver will be needed.

The objection, that the Code (§ 71) prohibits an action to be brought upon a judgment, does not apply: the prohibition is against what is known at common law as an action on the judgment: one in which another judgment is to be obtained only for the recovery of the debt contained in the first judgment. This action is not on the judgment, but on that and other material facts, namely, the ownership, by the defendant, of property held in trust for him, or for his benefit, or of debts due to him, and is not to obtain money against him personally, but the application of that property in satisfaction of the judgment.

If there should be any oppression in resorting to an action when the summary proceedings would be more proper, the court has a remedy in its own power in the disposition of the costs, as, in such actions, costs are in its discretion.

Judgment should be entered for the plaintiff, unless the defendant, within twenty days, put in an answer, and pay the costs on the demurrer.

SUPREME COURT.

SAMUEL L. MITCHELL agt. J. BURROWS HYDE and ANN MARIA HYDE.

An averment in the complaint that the note was payable to the order of A—— B——, (the defendant,) and subsequently endorsed by him in blank, and transferred to the plaintiff, is a sufficient averment of the plaintiff's ownership or title to the note

New-York Special Term, March, 1855.

TRIAL by the court—mortgage foreclosure case.—The facts will sufficiently appear in the opinion.

Mitchell agt. J. B. Hyde and Ann Maria Hyde.

BURRILL, DAVISON & BURRILL, *for plaintiff.*
VAN BUREN & ROBINSON, *for defendants.*

COWLES, Justice. The first question to be disposed of is the objection raised by the defendants, that the complaint contains no sufficient averment that the plaintiff is the owner of the notes mentioned therein.

The complaint alleges that the notes were payable to the order of J. Burrows Hyde, subsequently endorsed by him in blank, and transferred to the plaintiff.

This, I think, is a sufficient averment of the plaintiff's ownership, or title to the notes.

An endorsement in blank makes the note payable to the holder, (*James agt. Chalmers*, 1 *Duer*, 52,) and, with the allegation that the notes were transferred to the plaintiff, makes out a sufficient averment that the plaintiff was the owner and holder of the notes in question. (*Appleby agt. Elkins*, 2 *Sand. S. C. R.* 672.) Besides, the answer itself is to be deemed an admission that the notes were originally transferred to the plaintiff, but sets up a subsequent parting with them to the Fulton Bank.

The objection, therefore, that the complaint does not show facts sufficient to constitute a cause of action, so far as relates to the plaintiff's title to the notes, is untenable, and the defendant's objection to that effect overruled.

The court find that the notes and bond and mortgage were given, made and executed as set forth in the complaint, and that they all belonged to the plaintiff at the time of the commencement of the action.

That the notes set forth in the complaint are due.

That the amount due, by the notes and bond and mortgage, on the 20th of March, 1855, was \$5,151.63.

Upon these facts the plaintiff is entitled to a decree of foreclosure and sale of the premises set forth in the complaint—with costs of action.

The objection raised by defendants that the bank had no right to part with the notes, without a vote of the board of directors, cannot be sustained.

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The Fulton Bank only received payment of a debt, but did not part with property within the meaning of the statute. (1 R. S. 591, § 8.)

Let the usual decree, with costs, be entered, that the premises be sold by the sheriff of the city and county of New-York.

—————

SUPREME COURT.

DALE and others agt. FOWLER and others.

Where some of the creditors agreed in writing, with their debtors, to accept, in full satisfaction, the debtors' notes for forty cents on the dollar, payable in three and six months, and instead of the notes being given or tendered, the debtors made an assignment—*held*, that the debtors had waived the discount (sixty per cent.) and remitted themselves to their original indebtedness to those creditors.

New-York Special Term, 1855.

S. P. NASH, *for plaintiffs.*

JOHN NEWLAND, *for defendants.*

ROOSEVELT, Justice. The composition made by the defendants with their creditors, was in effect, if not in express terms, conditional. The creditors agreed, not to release absolutely and immediately, but to "accept in full satisfaction" the debtor's notes for forty cents on the dollar, payable, one half in three and the other half in six months. They could not accept the notes unless they were tendered. No tender was made, neither during the time the notes were to run, nor at any time. How, then, can the defendants, upon any principle, either of law or equity, claim to be released from sixty per cent. of the debt—a release, the right to which depended on their giving, at least, if not paying, the notes. From some cause, which the subsequent assignment probably explains, they would seem (as

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they had a right to do) to have abandoned the privilege granted to them by the agreement. Certain creditors, whose co-operation was deemed important, may have declined to come in, and have thereby rendered the proposed liberality of the others of no practical advantage. At all events, those who signed did so upon the implied, if not express, condition that the debtors, if they intended to avail themselves of the proffered bounty, were to do so within a reasonable time, by giving their notes, if not immediately, at least before the periods of payment expired. Not having done so, the defendants have waived the discount, and remitted themselves to their original indebtedness.

As to the assignment subsequently executed, it contained no stipulation for a discharge. On the contrary, it provided for an equal pro rata distribution of the assigned assets, and for the payment, if sufficient, of "all the debts and liabilities *in full*." It was executed moreover before the notes, if given, would have become due—and is conclusive evidence, therefore, that the debtors had abandoned all idea of continuing their business, or of availing themselves of the plaintiffs' proffered liberality. They divested themselves by the act, of all means of paying the notes, if given.

The eighty dollars accepted under the assignment operated only as so much received on account; and judgment must accordingly be entered for the full balance of the original debt, with interest and costs. (*Good agt. Cheeseman, 2 Barn. & Adolphus, 328; Cranley agt. Hillary, 2 Maule & Sel. 120.*)

Rateau agt. Bernard and others.

SUPREME COURT.

RATEAU agt. BERNARD and others.

An injunction should not be allowed or sustained on an affidavit or verified complaint, where the material allegations are made merely on information and belief.

New-York Special Term, Nov., 1854.

MOTION to dissolve injunction made on complaint and answer.

JAMES MORROGH, *for plaintiff.*
C. BAINBRIDGE SMITH, *for defendants.*

MORRIS, Justice. The complaint in this case is verified by James Morrogh, Esq., the attorney for the plaintiff, and is entirely upon information and belief.

The plaintiff is a citizen and resident of France. Mr. Morrogh states his information is obtained from letters written to him by the plaintiff, by information from merchants and others in the city of New-York, and from duly legalized certified copies of letters.

Mr. Morrogh does not verify a single material fact upon his own knowledge.

An injunction should not be allowed or sustained on an affidavit or verified complaint, where the material allegations are made merely on information and belief. (1 *Code Rep.* 114; 3 *Prac. R.* 327; 5 *P. R.* 327—and authorities there cited.)

The injunction must be dissolved.

Starks, receiver, agt. Alfred S. Bates and Peter Bates.

SUPREME COURT.

STARKS, receiver, agt. ALFRED S. BATES and PETER BATES.

In an action affecting the title to lands, the court may change the place of trial as matter of right.

Where one defendant makes default, and it appears that he is assisting the plaintiff against his co-defendant, the latter may move alone, for a change of the place of trial.

New-York Special Term, Dec., 1854.

R. W. TOWNSEND, for motion.

RICHARD BUSTEED, opposed.

MITCHELL, Justice. The defendant Peter Bates moves to change the place of trial. Alfred S. Bates, the other defendant, has made default, and, in fact, is aiding the plaintiff, and makes an affidavit in opposition to this motion, in which he shows that his feelings and interest are all with the plaintiff. Under these circumstances, it is no objection that Alfred does not join in the motion. The action is to have a deed from Alfred to Peter declared void for fraud—or as held only for the benefit of Alfred.

This is an action to affect the title to lands, as, if it succeeds, the title of Peter will be made void, or changed from an absolute one to a mere security for money. A like cause of action has been held before, in this district, to be sufficient ground to change the place of trial as matter of right.

Motion granted—\$10 costs, to abide event.

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NEW-YORK COMMON PLEAS.

[No. 12.]

DAVID S. MILLS agt. JOHN E. FORBES and MARTIN KALBFLEISCH.

Upon an appeal by executors, a statement of a want of assets sufficient to pay the judgment, would probably be regarded as a good reason why the security on the undertaking should be limited, at least to the amount of assets disclosed, applicable to the payment of the judgment appealed from.

The manner in which the judgment is to be paid does not affect the primary liability of the *sureties* to the undertaking, although a compliance with the judgment in manner and form expressed, may discharge them from all obligation. Giving an undertaking by executors, without application to the court as to security, and demurring to the complaint against the *sureties*, are admissions of the possession of assets sufficient to pay the judgment in the manner directed.

Special Term, June, 1856.

THE defendants were sureties of the executors of John Thursby, deceased, upon an appeal from a judgment rendered at the special term, to the general term of the supreme court. (See *Mills agt. Thursby and others, executors, ante page 385, for the form of the judgment.*) The defendants demurred to the complaint upon the ground that it did not state facts sufficient to constitute a cause of action.

N. DANE ELLINGWOOD, *for defendants,*

Insisted that the *sureties* could not be compelled to pay more than was adjudged by the general term to be paid by their principals; that the judgment was not affirmed at the general term against the executors, for the whole amount of the judgment as it was rendered in the court below against John Thursby, but only to the extent of the proceeds of the goods and chattels of John Thursby in the hands of the executors, &c.;

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and the defendants, as sureties, were liable only for such amount when ascertained.

ALBERT MATHEWS, *for plaintiff,*

In reply said, if there had been any pretence of inability of the estate to pay the judgment, the executors might have applied to the court for leave to appeal without security—giving the undertaking to pay the judgment absolutely, was an admission of assets sufficient for that purpose. (*Code*, § 339.)

The defendants undertook, if the judgment was affirmed in whole or in part, that the appellants would pay the amount of the judgment, or that part as to which the judgment was affirmed. It had been affirmed in the *whole amount*, and the appellants had not paid. The modification of the judgment, as to the mode of enforcing it against the defendants in that action, did not make the judgment any the less *wholly affirmed* in respect to the amount to be paid. The words of the statute, (§ 355,) *in whole or in part*, have reference solely to the *amount payable*, and not to the process of executing the judgment.

BRADY, Judge. The Code (§ 339) provides that when an appeal is perfected, as provided by §§ 385, 386, 387 and 388, the court may, in its discretion, dispense with or limit the security to be given by §§ 385, 386 and 388, where the appellant is an executor, &c.; and thus, in effect, absolve the executor from the obligation to give security on an appeal, where a good reason is assigned by him for such indulgence. It is true that the section referred to relates to appeals to the court of appeals; but § 348 provides that, on an appeal to the general term, no stay is perfected unless security be given, *as upon an appeal to the court of appeals*, or the court so order upon such terms, *as to security or otherwise*, as may be just—such security not to exceed the amount required on an appeal to the court of appeals.

A statement of a want of assets sufficient to pay the judgment, would, no doubt, be regarded as a good reason why the security should be limited, at least to the amount of assets dis-



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closed, applicable to the payment of the judgment appealed from.

The object of the legislature, in my opinion, was to provide for just such a case as this, and to prevent the appellant executor from avoiding his bond by assuming, in the absence of the power of the court, to limit his security; that the legislature never designed that he should pay the judgment without regard to assets in his hands. They have, by §§ 389 and 348, provided against that, and thus silenced him in that respect.

I think the manner in which the judgment is to be paid, does not affect the primary liability of the sureties to the undertaking, although a compliance with the judgment, in manner and form expressed, may discharge them from all obligation. And a defence, alleging the application of all the property of the testator, as directed by the judgment, would be good, I think, although such property was, in fact, insufficient to discharge the judgment, and for the reason that the sureties undertake that the appellant will pay the judgment pronounced, or affirmed by the appellate court, and cannot be called upon to do more than their principal was by such judgment ordered to perform. But upon demurrer such a view of the question cannot be available. Giving an undertaking, without application to the court as to security, and demurring, are admissions of the possession of assets sufficient to pay the judgment in the manner directed, and entitles the plaintiff to judgment.

I consider all the facts necessary to establish the defendant's liability, alleged in the complaint, and that the demurrer is not well interposed. The defendants, however, have leave to answer in twenty days, on payment of costs.

Ordered accordingly.

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SUPREME COURT.

CORNELIUS V. S. ROOSEVELT agt. J. B. VARNUM, SIMEON DRAPE, ROBERT B. COLEMAN and THE MAYOR, &c., of NEW-YORK.

A person being a resident and tax-payer of the city of New-York, owning real and personal estate therein, may file his complaint for himself and all others interested, in an action against the *corporation and others* combining with it, for the purpose of preventing their disposition of the property of the city contrary to the charter of the city, or the statutes of the state, or in breach of the duties of the corporation as *quasi trustees*, when this unlawful disposition will cause a loss to the city.

The same principle will allow also an action, after the design of the defendants is partly accomplished, even by the execution of a deed, for the purpose of preventing any title being set up under that deed, and to cause the defendants to do such other acts as may be necessary to redress a wrong done, or about to be done, to the city.

A governor of the almshouse of the city of New-York cannot purchase for himself alone, or for himself and others, real estate belonging to the corporation of the city. A deed given upon such a purchase cannot be sustained.

The law which declares that no head of department, or other officer of the corporation, shall be directly or indirectly interested in the purchase of any real estate, or other property belonging to the corporation, includes the ten governors of the almshouse—they are the chief officers of the executive department of the corporation, known as the Almshouse Department.

New-York Special Term, March, 1855.

THIS was an action to set aside sale of real estate, made by the common council of New-York.

S. W. ROOSEVELT, *for plaintiff.*

Wm. M. EVARTS, *for defendants.*

MITCHELL, Justice. The complaint filed 25th January, 1853, states, in effect, although perhaps in terms which might require more definiteness, that the plaintiff is a resident and tax-payer of the city of New-York, owning real and personal estate situated therein, and that he files his complaint for himself and all

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others interested. This entitles him, according to the decisions of the supreme court in this district, to an action (against the corporation, and others combining with it,) for the purpose of preventing their disposition of the property of the city contrary to the charter of the city or the statutes of the state, or in breach of the duties of the corporation as *quasi trustees*, when this unlawful disposition will cause a loss to the city. The same principle will allow, also, an action, after the design of the defendants is partly accomplished, even by the execution of a deed, for the purpose of preventing any title being set up under that deed, and to cause the defendants to do such other acts as may be necessary to redress a wrong done, or about to be done, to the city. It is unnecessary here to vindicate that jurisdiction—in this court it now rests on authority; and those who observe the limits contained in the rule, will find little cause to apprehend any evil from it.

The complaint also shows, that the corporation, on the 20th of December, 1852, passed a resolution, "that the land to be made on the North River, with the bulkhead, between Gansevoort and Twelfth streets, be sold to D. R. Martin, or any other applicant for the purchase thereof; and that it be referred to the commissioners of the sinking fund to fix the terms and price—the proceeds of which to be paid into the sinking fund for the redemption of the city debt;" that a majority of the commissioners agreed to sell the property on certain terms, part of which were, that 25 per cent. should be paid on delivery of the deed, and the rest to remain on bond and mortgage for five years, with interest at 6 per cent. per annum; and that the majority rejected a proposal to sell or offer the property at auction, and fixed the price at \$160,000, and authorized a deed to be executed to Reuben Lovejoy for the same at that price; that thereupon the mayor and the clerk of the common council, on the 27th of December, 1852, affixed the seal of the corporation to a deed for the premises at the above price to J. B. Varnum, who executed a mortgage back for \$120,000; and, on the 31st of the same month, executed a deed to R. B. Coleman for an undivided half of the premises, subject to half

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of the mortgage; that both Varnum and Coleman were acquainted with all the facts stated in the complaint; and that Lovejoy was not, in fact, personally interested in the purchase, but that the defendant Draper was one of the persons actually influential and actually interested therein, and in the profits to be derived therefrom, and that he is charged in the books of the comptroller with the property, as if the sale were made directly to him; and that he, in fact, paid part of the purchase money, and is now, directly or indirectly, interested in the property, or the profits thereof, and is credited on the books of the late comptroller with the sum of \$40,000, as a payment of 25 per cent. on the purchase; and that he was, at that time, one of the governors of the almshouse.

The facts intended to be stated are, that Mr. Draper, while he was a governor of the almshouse, purchased for himself alone, or for himself and others, a large amount, in value, of the real estate belonging to the corporation, and that all the other defendants knew these facts; and the question argued, among others, was, is this lawful, and can the deed be sustained, or must it be vacated?

The statutes relating to this question are contained in chapters 187 and 246 of the laws of 1849, as amended in chapter 543 of the laws of 1851.

The first is the act to amend the charter of the city, passed April 2, 1849, but to take effect on June 1, 1849. (p. 278.)

The second is the act to provide for the government of the "*Department of Alms and Penitentiary*" in the city and county of New-York, passed April 6, 1849, and took effect on May 8, of that year. (p. 367; *see, also*, p. 570.)

Section 19, of chapter 187 of the act of 1849, declares that, "*No member of the common council, head of department, chief of bureau, deputy thereof, or clerk therein, or other officer of the corporation, shall be directly or indirectly interested in any contract, work or business, or the sale of any article, the expense, price or consideration of which is paid from the city treasury, or by any assessment levied by any act or ordinance of the common council, nor in the purchase of any real estate, or other property be-*

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longing to the *corporation*, or which shall be sold for taxes or assessments."

Section 17, of the same act, declares that, "There shall be an executive department, known as the 'Almshouse Department,' which shall have cognizance of all matters relating to the almshouse and prisons of said city; the *chief officers* shall be called 'Governors of the Almshouse.' They shall consist of the numbers, derive and hold their offices, and be charged with the duties and responsibilities, as prescribed by the act entitled 'An Act to Provide for the Government of the Almshouse and Penitentiary in the City and County of New-York.'"

The act thus last referred to is the act contained in chapter 246 of the laws of 1849, passed April 6, of that year—it is thus recognized in the act amending the charter before it was enacted, and its provisions were before the legislature at the time of passing the last act, so that the first act is to be interpreted as to anything in it relating to the heads of the department for the almshouse and penitentiary, as if the last act were then actually in force.

Section 9 of chapter 187, declares that "the *executive power* of the *corporation* shall be vested in the mayor, the *heads of departments*, and such other executive officers as shall be, from time to time, created by law."

Section 1, is that "the legislative power of the *corporation* shall continue to be vested in a board of aldermen and a board of assistant aldermen," &c.

It was argued for the defendants, that "the Ten Governors" were not officers of the *corporation*; that the great object of the act creating them was, to make them a separate body, and entirely independent of the *corporation*; and with this view they were not to be appointed by, or removed at the will of, the *corporation*. If impeached, they were to be impeached, not before the common council, but before the supreme court; and that they could require directly from the supervisors whatever sums they should find necessary for their department, without any action of the common council on the subject; and that

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therefore § 19, above quoted, did not apply to them, but only to officers who might be considered as acting under the common council, and subject to their control: and in furtherance of this distinction, it was argued that the ten governors received no compensation for their services, but the other officers were paid by the city. To meet this argument, it was necessary to refer to the above sections at large. They show that when "the corporation" is spoken of, it is that creation of the charter which includes the whole body corporate, and not the mere legislative body, or the common council.

Thus "the legislative power of the corporation" is spoken of and is vested in the aldermen and assistants:—(§ 1.) "The executive power of the corporation" is spoken of, and is vested in the mayor, the *heads of departments*, and such other executive officers as shall be, from time to time, created by law. (§ 9.)

The following sections point out the duties of the different departments, thus described by § 9, as having the executive power of the corporation—and thus being departments or officers of the corporation. Among these sections, § 17 declares, that there *shall* be an executive department, known as the "Almshouse Department," and speaks of its chief officers, and thus includes it among the departments of the corporation, and its chief officers, as officers of the corporation.

Section 19 follows, and declares that no *head of department*, or other officer of the corporation, shall be directly or indirectly interested in the purchase of any real estate, or other property, belonging to the corporation.

The previous 17th section had constituted the ten governors a department of the corporation, and declared them "the *chief officers* thereof." The chief officers of a department are the head of that department. The ten governors are, therefore, within the strict literal meaning of the 19th section: they are also "officers of the corporation," although not under the control of the common council: and so again within the same section. If they are not officers of the corporation, it would be difficult to show that the mayor was such an officer; and then a section drawn with great care, and with a wide enumeration of officers,

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would omit some of the most important officers of the city, and who would, from their position, have the most influence with their fellow officers, having the control of the city property.

If we look to the spirit of the law, there are as strong reasons why it should apply to the ten governors as to any other department. These officers have the power to demand of the supervisors whatever amount of money they may require for the relief and support of the poor. (§ 12 of *Chap. 246.*) This gives them a great money power—the disbursement of large funds, and the making of contracts of large amounts, which must be of great profit to some, if not to many. They thus have the means (if dishonestly disposed) of requiting a favor in the sale of lands, or in the giving of a contract, to their friends, by giving contracts in return to those who favor them—for this can be done even when the contract is given to the lowest bidder. They also, from their position, must become intimate with the other members of the corporation: they annually report their proceedings to the common council, and that body, by committees, is, at least twice a year, to visit and inspect this department, and all the institutions under its care: and in the discharge of their duties, they exercise the privilege of inviting that body to enjoy the hospitalities furnished by them. Does not their situation give them much greater opportunities of influence than any deputy or clerk in the police department, or in the department of repairs and supplies, or of streets and lamps, or in the law department, or any subordinate officer of the corporation could have? All these are clearly excluded, and why should not the ten governors, who are within the letter of the law, and have more means of influence?

It was said, the ten governors receive no compensation, and the others are paid. This is true: and that very circumstance would give them an influence, when applying to be allowed to make a purchase that others could not enjoy. It would naturally be said, these are honorable men, uninfluenced by selfish considerations, who give their time and their labor to the public without any compensation: they would be above any attempt to purchase the public property below its real value, and we

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may therefore safely sell to them, without loss to the public. And if the proposed purchaser were of a frank, open and generous disposition, full of public spirit, and above a mean and selfish act, his high character would strengthen this conclusion. Then it might well happen, as in this case, that three out of five of those who had the sale in charge, would reject a resolution to sell the land at auction, or to fix a maximum price for it at private sale, or to give it to the one offering, at private biddings, the highest price above a minimum sum ; and that a sale of so valuable a piece of property should be authorized and completed between the 22d and 27th days of the same month, just as the then existing common council were about yielding up their power.

In this case, the officer who is said to be the purchaser, sustains a high character, and so deservedly so, that if he had been advised that his purchase was of even doubtful legality, he would probably have abandoned it at once, if he could do so without appearing to admit an imputation on his fairness.

It is said, next, that the section referred to makes void only the contract for the purchase, and that the contract, being executed by the delivery of the deed, cannot be set aside. There may be cases in contracts between individuals where this rule would be properly applied. They might have power to rescind a contract, and lose that power if they chose to execute the contract—that might be deemed a waiver of their defence to the contract. But this law is passed to protect the public from the acts of its own officers. The officers—(the law-makers feared)—might do acts which would injure the public. No act, therefore, of the officers can take away the original defect in the title attempted to be passed. Neither they nor the common council—(much less the mayor and clerk)—have power to make an illegal contract valid by executing it. If they could, they have only to make a preliminary contract, and then make a sale, and the law would become a nullity. But the section is not confined to contracts; it declares that these officers shall not be interested, directly or indirectly, in any contract, &c., “nor in the *purchase* of any *real estate*, or other property, be-

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longing to the corporation." The giving of the deed, and the paying of the purchase money, are the material parts of the purchase—and are the very parts which constitute the evil which the act seeks to prevent or avoid.

The complaint shows that the other two individual defendants, who held no public office, knew all the facts stated in the complaint, when they purchased: they can, therefore, have no better title than the one who is one of the ten governors.

If this view of the case be correct, it is unnecessary to examine other objections raised to the purchase.

The individual defendants should reconvey to the corporation by a title free from all incumbrances, and with covenants against their own acts, and be repaid the amounts paid by them, with interest, and the mortgage be satisfied—unless the corporation should elect to have the property sold at auction, and in a manner conformably to law, in which case the defendants would be bound by their purchase, unless the property should bring more than \$160,000, and the interest thereon.

The costs of the plaintiff should be paid by the individual defendants; the corporation should bear their own costs.

SUPREME COURT.

THE CHEMICAL BANK agt. THE MAYOR, &c., of NEW-YORK,
THE BOARD OF SUPERVISORS, and HENRY HART, the Re-
ceiver of Taxes.

It is not when the plaintiff is entitled to *any* relief, but to the relief *demanded*, that a preliminary injunction may issue.

If the plaintiff will have a right of action against the collector or supervisors, after his (alleged illegal) tax shall be collected, that does not entitle him to an injunction to stay the collection of the tax; as, in that case, his cause of action will not accrue until the money shall be collected.

At the same time, there could be no simpler mode of settling such questions than by an action for an injunction, which would well apply, were it not for the strict provisions of the law.

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THE complaint shows that the bank has surplus funds, beyond its capital, amounting to more than \$426,000, of which nearly \$180,000 consists of investments in United States stocks; that these facts were duly established before the commissioners of taxes and the supervisors of the county, but were disregarded by them, and that the bank was taxed on the United States stocks, as well as on its other surplus funds. The complaint then asks for leave to pay the rest of the tax, and that an injunction be granted to restrain the defendants from collecting the tax assessed on the United States stocks.

R. H. MOREHOUSE, *for plaintiff.*

ROBERT J. DILLON, *for defendants.*

MITCHELL, Justice. There can be no need of an order of the court for the bank to pay or tender such a tax as it admits to be due, and if more be then unlawfully collected, the bank will have its remedy for that excess. The other remedy by injunction, the defendant's counsel insist, cannot be granted. Judge WOODRAFF, of the common pleas, has, in an elaborate opinion, ably explained the decisions on this subject. (*Wilson agt. Mayor, &c., N. Y.*) The cases of *Meserole agt. Brooklyn*, (26 Wend. 132—reversing, 8 Paige, 198,) *Van Doren agt. Mayor of New-York*, (9 id. 388,) *Livingston agt. Hollenbeck*, (4 Barb. S. C. R. 10,) and *Bouton agt. City Brooklyn*, (7 How. Pr. R. 198,) fully sustain the defendant's counsel, as the law stood before the Code was adopted; and the last case adopts the same rule under the Code. Justice STRONG, who decided the last case, sums up his reasoning by saying, in substance, that a court of law only provides a redress for a wrong after it is committed; a court of equity grants its preventive relief before the wrong is done, but under certain limits, which exclude a case like this, and that a court in which the functions of both are joined, (as is the case now, under the Code,) cannot extend its power beyond what was formerly possessed by the one court or the other, previous to the junction of the powers of both courts in one.

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The Code allows an injunction when it appears, by the complaint, that the plaintiff is entitled to the *relief demanded*, and such relief, or part of it, consists in restraining the commission or continuance of an act, the commission or continuance of which during the litigation, would produce injury to the plaintiff. (*Code*, § 219.) It is not when the plaintiff is entitled to any relief, but to the *relief demanded*. If by the law, as it stood before, the plaintiff had no right to the relief sought in a suit in his own name, he has none now;—as the section does not profess to extend the relief which the plaintiff might claim in such a suit. If the only final relief which he demands is a judgment for an injunction, then he must show that by the law as it stood before he was entitled to that relief. If the Code had allowed the injunction whenever the plaintiff was entitled to any relief, either in his own name or as relator in the name of the people, then if a *mandamus* or *certiorari* would lie, the preliminary injunction might be allowable—but such is not its language.

If the plaintiff will have a right of action against the collector or supervisors, after the tax shall be collected, that does not entitle him to the injunction, as in that case his cause of action will not accrue until the money shall be collected.

At the same time, it is very evident that there could be no simpler mode of settling such questions than by an action for an injunction. It brings up the precise merits of the case as applicable to the individual aggrieved alone, and does not involve in the suit the other tax-payers: it is subject to the equitable control of the court, and in that has a great advantage over an action brought for a trespass, when, in some cases, the whole assessment might be declared void, and he who was liable to pay a part be discharged from paying anything, on account of an informality in the proceedings. But the strict law seems to favor the objection made by the defendants, and the motion for an injunction is denied without costs.

Banta agt. Maxwell and others.

SUPREME COURT.

BANTA agt. MAXWELL and others.

A mortgage sale will be set aside where the owner of the property, or his attorney, has been misled by the agent of the mortgage-creditor, who bid off the premises, by his stating, verbally, to the owner, that the latter should have an opportunity to repurchase, on paying the claim of the mortgage-creditor with costs; and that the owner's rights should be protected—which agreement was not fulfilled, nor offered to be, after the purchase.

And especially where the purchaser at the sale requested the attorney for the owner not to bid; and the premises were sold considerably less than they would have been, had not the owner relied upon such verbal understanding—and for less than their value.

New-York Special Term, 1855.

THE defendant Maxwell moves to set aside a sale made of the mortgaged premises, and for an order that the sheriff shall not execute a deed to the purchaser. He is the owner of the premises subject to two mortgages—one to the plaintiff, and the other to the Mechanics' Building Association; and is liable for any deficiency to the association.

— SMITH, *for plaintiff.*
— LAY, *for defendant.*

MITCHELL, Justice. The premises were sold for \$2,500, to J. Pecare, agent for the association, and they are about to convey them to another person at a profit. Two persons offer to bid, at a new sale, one \$2,800, and the other \$2,850; and there is proof that the premises are worth about \$3,000. Maxwell swears that he had several conversations with Pecare, who told him that the association would purchase the premises at the sheriff's sale, and that Maxwell should have the privilege of repurchasing the premises, on paying the claim of the association with costs; and that Maxwell's rights should be protected. Pecare does not deny that he had several conversations on this

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subject, nor state what the conversations were, but contents himself with denying that he ever told Maxwell that the association would purchase the premises, and that Maxwell should have the privilege of repurchasing them by paying the claim of the association with costs, or that the rights of Maxwell would be protected. This is an illustration of a negative pregnant,—he may not have said all that he denies; but his denial may be true, and he may have said, in effect, that Maxwell should have the privilege of repurchasing the premises on the terms mentioned. That Maxwell so understood him is shown by the affidavit of Mr. Lay; and, in conformity with it, Mr. Pecare attended the sale and bid for the property, and *requested Mr. Lay* (Maxwell's attorney) *not to bid for it*.

The inference is, that Mr. Maxwell has been misled by what Mr. Pecare said, (although Mr. Pecare may not have intended to mislead,) and he should not be injured by a mistake caused by the acts of the agent of his creditor.

There should be a resale, at the cost and expense of Mr. Maxwell, unless he and the association and Mr. Pecare consent to a transfer of Mr. Pecare's bid to some person to be agreed on, who will pay, as purchase money, more than the \$2,500 bid. Mr. Maxwell should also pay \$10, the costs of this motion. He is chargeable with costs, as his carelessness in relying on a mere verbal agreement, subject to be misunderstood and difficult of proof, leads to the extra expense.

Brewer agt. Isish.

SUPREME COURT.

ANON H. BREWER, Appellant, agt. NEWLAND ISISH, Respondent.

In reference to exceptions on the trial, and report of referees. In a case where no questions of fact arise upon the evidence, and no interlocutory questions of law are raised on the trial, the decision of the referees will disclose all of the facts; and there will be nothing to which an *exception* can be taken but their *conclusions of law*, or their *decision upon those facts*. This *decision* is a proper subject of *exception*, and no bill of exceptions or case is necessary. A simple *exception* to the *decision* of the referees will present the whole question.

Consequently, where the legal questions presented by an appeal, arise on the facts found and reported by the referees, *no case or bill of exceptions* is necessary; but it is necessary only for the party to file and serve an exception to the decision of the referees, or to such specified parts thereof as he wishes to review. On such a decision, the party has, by § 268, *ten days* after notice of the judgment to except.

If, in addition to a review of this decision, the party desires to review the finding of the referees upon questions of fact, he can make a *case* setting forth the evidence. If questions of law are raised and passed upon in the course of the trial, and the party takes proper exceptions, he can present those questions by a *bill of exceptions*, setting forth as much of the evidence as may be necessary to present such questions.

If questions of *law* and *fact* arise during the trial, and the party desires a review upon both, he may incorporate his exceptions in his case—stating them separately from the facts.

But neither a *case* made for the purpose of reviewing questions of fact, nor *exceptions* which present only questions of law raised and passed upon during the trial, will bring up for review the *conclusion of law* or *final decision* of the referees upon the facts found by them.

For the purposes of an appeal, an *exception* to their *decision* as to all other decisions upon questions of law arising on the trial, must be taken.

Exceptions to all decisions made in the course of the trial, must be taken at the trial; and this would be so of the *final decision* of the referees, if it was required to be made then.

There is no authority for reviewing, on appeal, a decision to which no exception has been taken. On the contrary, it is plainly prohibited.

Therefore, although the referees' *report* is made by statute a part of the *record*, the court cannot review errors appearing on the *face of the record*, where no exceptions have been taken.

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Erie General Term, May, 1856.

*Present, BOWEN, P. J.; MULLETT, GREENE and MARVIN,
Justices.*

THIS is an appeal from a judgment entered on the report of a referee. The complaint contained two counts for work and labor performed and goods sold by the plaintiff and at the defendant's request.

The second answer of the defendant set up a counter claim for work and labor, goods sold, &c., amounting to \$100, and claimed judgment against the plaintiff for \$50. There was no reply to this answer. The referee found and reported that the plaintiff had performed work and labor for the defendant, and sold and delivered to him property of the value of \$39.94, and decided, as a matter of law, that the plaintiff, by omitting to reply to the answer of the defendant, admitted the set-off therein claimed; and that the defendant, in claiming to set off the demand set up in his answer, and claiming judgment for \$50, was entitled to recover the sum of \$50 over and above the amount of the plaintiff's demand as proved. There are no exceptions in the case, which contains only the notice of appeal, pleadings and referee's report. Judgment was entered on the report, and the plaintiff appeals to this court.

J. L. BROWN, for appellant.

WAKEMAN & BRYAN, for respondent.

By the court—*GREENE, Justice.* It is claimed by the appellant that the referee erred in rendering judgment for the defendant for the amount of his counter claim, as it is alleged in his answer, without requiring proof of the amount of such claim. The appellant insists that the only effect of a failure to reply to that part of the answer, is to admit *a cause of action of the nature alleged*, and that without proof of the amount of his claim, the defendant was entitled to be allowed no more than nominal damages by way of set-off.

The respondent insists that the appellant is precluded from raising this question by his omission to except to the decision of the referee. The appellant, on the contrary, insists that we

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are bound to review and correct all errors apparent on the face of the record, and that, as the alleged error appears by the report, which constitutes a part of the judgment roll, no exception is necessary to enable us to review it.

This was the settled practice on a writ of error, and the only question is, whether, by the code, we are limited on an appeal to a review of errors specifically pointed out by exceptions.

By § 823, it is provided that "writs of error in civil actions, as they have heretofore existed, are abolished, and the only mode of reviewing a judgment, or order, in a civil action, shall be that prescribed by this title." Chapter 2 of title 9 contains provisions regulating appeals to the court of appeals. Chapter 3 regulates appeals to this court from inferior courts; and chapter 4 relates to appeals in this court and certain local courts from judgments entered upon the direction of a single judge or the reports of referees. Section 348 of that chapter provides that "in the supreme court * * * an appeal *upon the law* may be taken to the general term from a judgment entered upon the report of referees or the direction of a single judge of the same court in all cases, *and upon the facts, when the trial is by the court or referees.*"

The manner in which trials are to be conducted before courts and referees, and in which exceptions are to be taken and cases prepared for the purpose of an appeal, is prescribed by §§ 267, 268 and 272. Section 267 provides that "upon the trial of a question of fact by the court, its decision shall be given in writing, and filed with the clerk within twenty days after the court at which the trial took place. Judgment upon the decision shall be entered accordingly." Section 272 is in these words: "The trial by referees is conducted in the same manner, and on a similar notice, as a trial by the court * * *. They must state the facts found, and the conclusions of law separately, and their decision must be given, *and may be excepted to and reviewed in like manner, but not otherwise, and they may in like manner settle a case or exceptions.* The report of the referees upon the whole issue stands as the decision of the court, and judgment may be entered thereon in the same man-

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ner as if the action had been tried by the court. When the reference is to report the facts, the report has the effect of a special verdict."

By § 268, it is provided that "*for the purpose of an appeal*, either party may except to a decision on a matter of law arising upon such trial, within ten days after notice in writing of the judgment, in the same manner and with the same effect as upon a trial by jury. And either party desiring a review upon the evidence appearing on the trial, either of the questions of fact or of law, may, at any time within ten days after notice of the judgment, or within such time as may be prescribed by the rules of the court, make a case or exceptions in like manner as upon a trial by jury, except that the judge, in settling the case, must briefly specify the facts found by him, and his conclusion of law. But the questions, whether of fact or of law, arising upon the trial, *can only be reviewed in the manner prescribed by this section*,—the questions of law in every stage of the appeal, and the questions of fact upon the appeal, to the general term of the same court, as prescribed in section three hundred and forty-eight."

It will be useful, in the examination of this question, to notice the various amendments of those sections that have been adopted since 1848. Sections 222, 223 and 227 of the Code of 1848 correspond, in the subject matter of their provisions, with §§ 267, 268 and 272 of the subsequent editions of the Code.

Section 222 provided that upon the trial of a question of fact by the court, the facts found by the judge should "be first stated, and then the conclusion of law upon them." Section 223 contained substantially the same provisions as those contained in the two first clauses of § 268; the last clause providing that the party desiring a review of the questions of law or fact arising upon the evidence, might make a *case* containing so much of the evidence as was material to the question to be raised. Section 227 provided that the report of the referees should stand as the decision of the court in the same manner as if the action had been tried by the court, and that their decision upon

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the matter referred might be excepted to and reviewed in like manner.

By the amendment of 1849, the provision in § 222 (267), requiring the judge to state the facts found by him in his written decision, was stricken out, and § 223 (268) was amended only in its phraseology, leaving the above provisions unchanged. Section 227 (272) retained the original provision as to reviewing the decision of referees, unchanged, and added a provision that a *rehearing* might be granted by the court in which the judgment was entered.

In the amendments of 1851, no change was made in § 267. Section 268 was amended by a provision that the party desiring a review upon the evidence, &c., might make a case or bill of exceptions containing so much of the *evidence* and such *exceptions* as might be material to the questions to be raised. It was further provided that the judge, in settling *such case*, shall specify the facts found by him, and his conclusions of law. Section 272 was so amended as to require the trial by referees to be conducted in the same manner as a trial by the court, and to give the referees the same power as the court to grant adjournments, and to require them *to state the facts found and the conclusions of law separately*. It was also provided that their decision should be given, and excepted to and reviewed in the same manner as decisions of the court, that their report upon the whole issue should stand as the decision of the court, and that *when the reference was to report facts, the report should have the effect of a special verdict*.

No change was made in § 267 by the amendments of 1852. Section 268, as then amended, contains substantially the same provisions as to exceptions, and the manner of settling the case by the judge, as were inserted by the amendment of 1851, and the additional provision that the questions, whether of fact or of law, arising on the trial, *should be reviewed only in the manner provided by that section*. Section 272, as last amended, contains all the provisions inserted by the amendment of 1851, and, in addition to the provision that the decision of the referees may be excepted to and reviewed in like manner as a decision

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by the court, the significant words, "*but not otherwise,*" are added.

It will be seen, from this review of the various amendments of these sections, that the provisions of § 268, prescribing the manner of excepting to and reviewing decisions in cases tried by the court, and the provision in § 272, for the same exceptions and mode of review in cases tried by referees, have been retained without substantial change, since the adoption of the Code.

What are those exceptions? and when and how are they to be taken? are the questions involved in this case.

I think it is apparent, as well from the language of § 268, as from its history and subject matter, that two classes of exceptions are contemplated by its provisions. The first clause of the section provides that either party may except to a decision on a matter of law arising on the trial within ten days after notice of the judgment. This clause could not have been intended, and it has never been construed so as to authorize a party to except to a decision made on the trial in relation to the reception or rejection of evidence, or to take any exception which he might, and, according to the ordinary course of practice, would have been required to take on the trial. And yet such exceptions come within the letter of the section—they relate to "matters" or questions of law arising on the trial. It is clear, however, that they were not intended by the language of this clause, and that, as to such exceptions, the party, for all purposes of an appeal, is limited to those taken on the trial. The section accordingly provides, in the next clause, that the party desiring a review either of the questions of law or fact arising upon the evidence appearing on the trial, may, within ten days, *make a case* or exceptions, or (in the more familiar and appropriate language of the law) a bill of exceptions, in like manner as upon a trial by jury. The question, then, is, what are the exceptions mentioned in the first clause of this section?

I think a careful consideration of all the provisions of the sections above cited, and especially of the provisions in relation

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to the trial and decision of issues of fact by courts and referees and the known course of practice in such cases, will suggest the true answer.

By the provisions of § 222 (268) of the Code of 1848, the judge who tried a question of fact was required to state in his decision the facts found by him, and his legal conclusions separately. In a case where no question of fact arose upon the evidence, and no interlocutory questions of law were raised on the trial, as the decision of the judge would disclose all of the facts, there would be nothing to which an exception could be taken but his conclusion of law, or his decision upon those facts. This decision, like his charge to the jury in a case tried before a jury, would be a proper subject of exception, and no bill of exceptions or case would be necessary. A simple exception to his decision would present the whole question. And we held accordingly in the case of *Gwinn* agt. *Stratton*, decided at the general term in this district, in January, 1854, where the legal questions presented by the appeal, arose on the facts found and reported by the referee, that no case or bill of exceptions was necessary ; but that it was necessary only for the party to file and serve an exception to the decision of the referee, or to such specified parts thereof as he wished to review. But as the decision in such a case would not ordinarily be made at the trial, the party aggrieved would have no opportunity to except until he was apprised of the decision after the trial ; and by the first clause of § 268, it was provided that he should have ten days after notice of the judgment, to except. If, in addition to a review of this decision, the party desires to review the finding of the judge or referee upon questions of fact, he can make a case, setting forth the evidence. If questions of law are raised and passed upon in the course of the trial, and the party takes proper exceptions, he can present those questions by what are termed, in this section, exceptions—consisting, as I suppose, of a statement in the nature of a bill of exceptions, setting forth as much of the evidence as may be necessary to present the questions. If questions of law and fact arise during the trial, and the party desires a review upon both, he may

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probably incorporate his exceptions in his case, though a more convenient and lawyerlike practice would be to present them separately. But neither a case made for the purpose of reviewing questions of fact, nor exceptions which present only such questions of law as were raised and passed upon during the trial, will bring up for review the conclusion of law or final decision of the judge or referee upon the facts found by him. "For the purposes of an appeal," the section in question requires an exception to this decision as to all other decisions upon questions of law arising on the trial. Exceptions to all decisions made in the course of the trial must, from the nature of such exceptions, and of a trial, be taken at the trial. And this would be so of the final decision, if it was required to be made then. No one would doubt the necessity of taking an exception to the final decision, if it was the practice to render it at the close of the trial. But the legislature contemplated that the judge would take time to deliberate upon the case before making a decision, and hence gave the party the usual time to *take* an exception to it, while as to all other exceptions it gave him time to *state* them in proper form for review—in other words, to "make a case or exceptions," containing a statement of the exceptions previously taken.

I think the result of the several provisions of the Code bearing upon this question, may be thus stated: Section 323 abolishes writs of error in civil actions, and provides that the manner of reviewing judgments in such actions, shall be by appeal. Section 268 provides that for the purposes of an appeal the exceptions above suggested shall be taken, and that the decisions mentioned in that section shall be reviewed *only in the manner therein provided*; and section 272 provides that the decisions of referees shall be *excepted to and reviewed* in the same manner as decisions mentioned in section 268, *and not otherwise*. I can find no authority in these provisions for reviewing a decision to which no exception has been taken. On the contrary, I think the provisions cited plainly prohibit it. To the suggestion of the appellant, that the referee's report is made, by the statute, a part of the record, and that we should review all errors there

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appearing, there are several answers. In the first place, that was a rule peculiar to writs of error, which are abolished. A bill of exceptions, also, was made by statute a part of the record, but a judgment was never reversed for any error disclosed by the bill of exceptions, unless a proper exception was taken. The former practice of reviewing the decision of a referee on a motion to set aside his report, in which this technical strictness was disregarded, no longer prevails. The statute, as we have seen, provides that it shall be done on specific exceptions. Nor can the report be treated as a special verdict, which merely presented certain facts for the judgment of the court. The report is a decision, and is followed by a judgment of the court on the facts found thereby, and the question presented by an appeal is upon the judgment itself. Besides, § 272 provides when the report shall be regarded as a special verdict, that is, when the reference is merely to *report the facts*.

The case of *Gilchrist* agt. *Stevenson*, in this court, (7 How. Pr. R. 278,) and the cases of *Sands* agt. *Church*, (2 Seld. 347,) and *Stevens* agt. *Reynolds*, (*Id.* 454,) though not precisely in point, seem to favor this view of the question.

In the case of *Stevens* agt. *Reynolds*, the issues had been tried before Justice *WELLES*, and the parties, instead of making exceptions, entered into a stipulation that the plaintiff should be considered as having duly excepted to the finding and decision of the judge. The court affirmed the judgment on the ground that the decision of the judge at the circuit was right. *Johnson*, J., at the close of his opinion, notices the manner in which the case was presented, and says: "The cause was tried before a judge without a jury, and, under § 268, the party complaining of the decision should have excepted and made his bill of exceptions in the same way as if the trial had been by jury. Had our conclusion upon the question of law involved been favorable to the plaintiff, we should not have felt at liberty to reverse the judgment on these papers."

Gilchrist agt. *Stevenson* was a motion for leave to file exceptions to the decision of the judge after judgment had been entered. Justice *HAND*, in discussing the question as to the na-

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ture and office of these two classes of exceptions, says: "If the exception be for some supposed error apparent on the face of the record, that is, if any decision, even on a question of fact, be inconsistent with the pleading, I do not see why he may not except without reference to anything that transpired on the trial."

There being no exceptions in this case, I think we cannot review the alleged errors in the decisions of the referee.

The judgment must therefore be affirmed.

SUPREME COURT.

HORNBY agt. CRAMER and others.

A *notice of sale* on a foreclosure of a mortgage, by advertisement, which states that the sale will take place at the *City Hall*, (New-York,) is sufficient, without stating the *particular place*. All the buildings used for holding courts within the Park, are by law deemed parts of the City Hall; so that the notice would be too indefinite, were it not that, by *common usage*, there is one established place for such sales, and that is the *rotunda* in the City Hall proper.

The statute (1844, amending 2 R. S. 545, § 8) makes the sale a *bar* only to such parties "who shall have been served with notice of said sale as required by law;" and those parties are, the mortagor, or his personal representatives, and the subsequent grantees and mortgagees, whose conveyance and mortgage are on record at the time of the first publication of the notice, and all persons having a lien under a subsequent judgment or decree.

The notice is to be *served* personally, or by leaving it at their dwelling, in charge of a person of suitable age, or by serving a copy, at least twenty-eight days prior to the time therein specified for the sale, by depositing the same in the post-office, properly folded and directed to the persons at their places of residence.

Therefore, where service is made by mail, the twenty-eight days are to be counted from the time of the *deposit* of the letter, and not from the *post-mark*, or the forwarding of the letter. And a notice *deposited* on the 4th of April for the 3d of May, held sufficient, although it was post-marked the 5th of April.

Where the affidavit shows that the notice of sale was once *affixed*, it is sufficient, without also showing that the individual who affixed it, afterwards saw

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it there. If the notice is once affixed, it is presumed that it remained so until the contrary appears. And *semble*, that a subsequent removal by a stranger would not affect the title.

The affidavit may be made by the person who affixed the notice, or by any other person *who saw the notice during the time required*. This last is intended to be an equivalent to the first; so that one who saw the notice posted twelve weeks prior to the time of sale, has seen it during the time required.

It cannot mean that such other person should see it posted every minute, hour, or day, or even week, of the twelve weeks; but it is safer and more prudent to see the posting weekly.

Where a subsequent incumbrancer claims an assignment of a mortgage, on foreclosure, he must *tender* the amount of principal and interest, and costs, to the mortgagee; merely saying what he will do, and thereupon paying the amount into court, by depositing in a trust company, does not stay the proceedings of the mortgagee, nor stop the interest due to him.

New-York Special Term, June, 1855.

WEEKS & DE FOREST, for plaintiff.

MANN & RODMAN, for defendants.

MITCHELL, Justice. Cramer commenced a foreclosure by advertisement, giving notice, on Dec. 30, 1854, that the sale would be on the 29th of March, 1855, at 10 A. M., at the City Hall, in the city of New-York. At the day appointed, the attorneys for Hornby and Cramer met at the rotunda in the City Hall, and objection was made that Hornby, who was a subsequent mortgagee, had not been served with any notice of the sale; and that the notice did not state in what part of the City Hall the sale would take place. All the buildings used for holding courts within the Park are, by law, deemed parts of the City Hall: so that the notice would be too indefinite were it not that, by common usage, there is one established place for such sales, and that is the rotunda in the City Hall proper. It is like a notice of sale at the Merchants' Exchange—that would be sufficient notice, but the sale should be in the rotunda. That objection was bad. The other objection was good.

The Revised Statutes, as amended in 1844, (*Chap. 346,*) required notice of the sale to be given to the mortgagor, or his

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personal representatives, and to the subsequent grantees and mortgagees, whose conveyance and mortgage are on record, at the time of their first publication of the notice, and upon all persons having a lien under a subsequent judgment or decree, by serving it personally, or leaving it at their dwelling, in charge of a person of suitable age, or by serving a copy, "at least twenty-eight days prior to the *time* therein specified for the sale; by *depositing* the same in the post-office, properly folded and directed to the persons at their places of residence."

The act of 1844 so amends the Revised Statutes (2 R. S. 545, § 8,) as to make the sale a bar only to such parties "who shall have been served with notice of said sale, as required by law." (*Laws of 1844, Ch. 846, § 4.*)

These objections being made, Cramer postponed the sale to the 3d of May, 1855, and published new notices on the 30th of March, 1855, and caused notice of the sale to be *deposited* in the post-office for Hornby on the 4th of April 1855. Hornby objects that this notice was too short; that it should be for twenty-eight days, and he says it was for twenty-seven only, as it was post-marked the 5th of April—and he contends the post-mark must control. The post-mark shows the day when the letter was *forwarded* by mail, not the day when the letter was deposited in the post-office. The act requires the notice to be by *depositing* the letter in the post-office twenty-eight days prior to the *time* specified for the sale. The twenty-eight days are to be counted from the time of the *deposit* of the letter, not of the forwarding of the letter.

There used to be sometimes an old distinction between a notice to be served, or thing to be done, a certain number of days before a *thing was* to be done, and before the *day* on which the thing was to be done; and the latter was held to exclude, in computation, the day of the service, and *also* the *day* on which the thing was to be done; while, in the former case, one day was included and the other excluded, in the computation. Such subtle distinctions, probably, no longer prevail; and the Code, if it can apply to these proceedings, always excludes the *first day* and includes the *last*, in the *computation*. (§§ 407, 425.)

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In this case, if the old subtlety prevails, one day is still to be included in the computation—that is, to be counted as one of the twenty-eight:) for the act is, that the notice is to be twenty-eight days prior to the *time* specified—not prior to the *day* of the sale. Then, if the post-mark prevailed, excluding the 5th of April from the number of days, and including the day of sale, the 3d of May—there were twenty-five days in April and three in May, which was enough.

It is objected, that the affidavit of posting only shows that the person putting up the notice, put it there, without showing that he afterwards saw it there. The statute allows the affidavit of *affixing* the notice to be made by the person who *affixed* the same, or by any other person who saw such notice so posted *during* the time required. (2 R. S. 547, § 10, amended 1844, Ch. 346.)

If the notice is once affixed, it is presumed that it remained so until the contrary appears; and it may be that a subsequent removal by a stranger would not affect the title. There is no proof that it was removed:—all that the statute requires is an *affixing* of the notice twelve weeks prior to the time specified for the sale, (*Laws of 1844, Ch. 277, § 5,*) and an affidavit of the *affixing* of the notice. (*Laws of 1844, Ch. 346.*) In the case of publication in the newspaper, it says, by publishing for twelve weeks *successively*, at least *once* a week; showing expressly that it is to be renewed every week. In the case of *affixing*, no language is used indicating a necessity of a renewal. Once affixing seems to satisfy the words of the statute. The affidavit may be made by the person who affixed the same, or by any other person who saw the notice posted *during* the time required. This last is intended to be an equivalent to the first; so that one who saw the notice posted twelve weeks prior to the time of sale, has seen it during the time required. It cannot mean that such other person should see it posted every minute, hour, or day, or even week, of the twelve weeks, while the person affixing the notice need only to swear to the affixing. Undoubtedly, it is safer and more prudent to see the posting weekly: and the fee-bill allows a fee of \$1 for the expense

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of posting the advertisement and *inspecting the same*. As \$1 has been allowed in taxation for a copy notice for posting, (*Collins agt. Standish, &c.*, 6 *Pr. R.* 495,) it would add considerably to the expense, if the party were to take each week a new copy to put up, if the first were lost. At all events, as in this case there is no proof that the notice was taken down, and no question of title actually arises, it must be deemed sufficient.

On the first proceeding, Hinmon and Scott, owners respectively of parts of the premises, and the judgment-creditors of Scott, were not notified. In this, also, that proceeding was irregular; and Hornby could not safely buy at the sale, as their rights would not be cut off. For these irregularities, Cramer cannot charge any of the costs of the sale first attempted, viz., to 28th March, inclusive.

Hornby claimed the right to redeem, and have an assignment of Cramer's mortgage, on payment of principal and interest only. Cramer offered to assign his mortgage, but insisted on principal, interest, and the costs of the first proceeding. Cramer then adjourned the sale to a day so remote as to enable him to comply with the law, as to the *omitted* parties, if the first notice were a nullity; and the parties still differing about the costs, Hornby filed his bill, and on paying into court the principal and interest, and about \$100 to cover costs, obtained an injunction to prevent Cramer's proceedings in the sale. The parties each insist on their strict rights; and if each suffers, it is the result of his indisposition to make any concession.

Cramer, for the reasons before stated, can recover no costs of the first proceeding. But his second proceeding was regular, and Hornby made no legal tender, which made it the duty of Cramer to suspend his advertisement until the money was paid into court. He merely *said* what he would do: he produced no money, and made no tender of any—and, for aught that appears had not the money ready. Cramer, until the *money* was produced and offered to him, was not bound to assume that it would be forthcoming.

The plaintiff, therefore, must pay the costs in the second

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proceeding to sell, to be taxed, as in *Collins agt. Standish*, (6 *Pr. R.* 493, &c.,) and the defendant Cramer's costs in this action, including \$10 costs of this motion, and the principal due to Hornby, with interest at seven per cent.; and Cramer, at the same time, must assign the bond and mortgage held by him to Hornby, in proper form and with proper covenants, to be settled by one of the judges of this court, and consent to an order that the money on deposit be repaid to the plaintiff, with any increase thereon.

The plaintiff deposited the money in the Trust Company, and contends that he should not pay interest to Cramer for that time. To stop the interest, he should have tendered the money directly to Cramer. Cramer was entitled to have his money in his own hands, and not to have it locked up to abide the event of this suit.

Let an order or judgment be entered accordingly.

SUPREME COURT.

**MICHAEL CALLIGAN, Receiver, &c., respondent, agt. STILES
Mix, appellant.**

Where the *return* of a justice of the peace does *not show* evidence sufficient to sustain the judgment; and where the justice *does not certify that his return contains all the evidence, &c.*, given and had before him; the appellate court will, in support of the judgment, *presume* that there was *other and sufficient* evidence given to warrant the judgment.

Albany General Term, March, 1856.

Present, HARRIS, WATSON and GOULD, Justices.

APPEAL from the judgment of the county court, affirming the judgment of the Albany justices' court.

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J. B. STURTEVANT, *for appellant.*
S. G. COURTNEY, *for respondent.*

By the court—GOULD, Justice. There is no difference of opinion, nor any hesitancy, in the court as to the proper decision of this cause. It is entirely plain that there never was any delivery of the property to Lynch, *accepted by him* so as to make a sale, on which Mix could have sued him for the price. And the decisions of both the county court, and the Albany justices' court, must be reversed, and judgment for costs given for the defendant.

Were this *all* of the case, there would be no occasion to write any opinion upon it. But there is a point made, on the part of the respondent; (and it is the real ground on which the county court based its decision;) which the court think should be directly adjudicated under the provisions of the Code.

It is this: That, upon an appeal to a county court from a justice's judgment, where the return does *not show* evidence sufficient to sustain the judgment; and *where the justice does not certify that his return contains all the evidence, &c., given and had before him;* the appellate court will, in support of the judgment, *presume* that there was *other and sufficient* evidence given to warrant the judgment.

This has been uniformly held, in cases brought up by *certiorari*; and there is no occasion to question its propriety; because, by the statute regulating proceedings under that writ, (*see 2 Rev. Sts., 3d ed., p. 851, § 181.*) it is provided that the justice, in his return, *shall truly and fully answer to all the facts set forth in the affidavit on which the certiorari was allowed.*" And by the second section thereafter, (*§ 183.*) it is provided that the justice may be compelled to "*amend* such return;" which compulsory amendment was always treated as so entirely within the power of the party, (on proper application to the court,) that it was considered his own fault if the return did not, on its face, show that it contained all the proceedings, *if showing that were essential to him;* especially as, in his affidavit, he was not bound to set forth, and require answer to, the *whole*

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case; but only "the substance" of the proceedings before the justice.

The proceeding by appeal, under the Code, differs essentially from the former proceeding; as is apparent on reading § 360; which provides that the court appealed from shall make a return "*of the testimony, proceedings and judgment.*" And this return is made on a mere notice of appeal.

It is true that § 362 provides (as did the Revised Statutes) for compelling "*an amended return,*" if the return made be defective.

But in the absence of any such *amended* return, or with such amended return, the provision of the former section remains. And whenever (with or without one, or any number of amended returns) *the* return is finally completed, it *must be presumed to be in compliance with the law.* That law is, that the return contains "*THE* testimony," &c.; which beyond all doubt means the *whole* testimony, &c.; and leaves not the least apology or opportunity for the application of the former rule, above referred to. And it is impossible to retain that rule, under the provision above stated.

SUPREME COURT.

THE LAIGHT STREET BAPTIST CHURCH agt. NOE and others.

If a *trustee* withdraws from a religious society, so that it can be said, he no longer belongs to it, he ceases to be a trustee; and the society can elect a qualified person in his place.

Letters of dismissal, asked for and obtained by the trustees (members) of a church, are not *conclusive* evidence that they have withdrawn from the *civil constituency* of the church; they are evidence only of a withdrawal from its spiritual communion, or the sacramental ordinances.

But where the trustees of a church take letters of dismissal, and, in addition, manifest a disposition incompatible with their duties to the church,—endeavoring to induce other members to leave it, and actually succeed in organizing

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another society, &c., they must be considered as having seceded from the church, and in effect to have abdicated their office as trustees. And an injunction will be granted restraining their action as such trustees.

New-York Special Term, October, 1855.

MOTION for a preliminary injunction to restrain the defendants from acting as trustees of the Laight Street Baptist Church, New-York.

E. D. CULVER, *for motion.*

R. H. BOWNE, *opposed.*

CLERKE, Justice. It can scarcely be contended that any person, not belonging to the church, is qualified to act as trustee. The language of the third section of the act of 1813, providing for the incorporation of religious societies, is, I think, clear on this point. As a qualification for electors of officers of the church, it states, in terms, that they must be persons belonging to it ; stating, also, that the persons elected must be "discreet persons of their church." At the time of their election, then, the trustees must *belong* to the society ; not necessarily in spiritual communion with it ; but, in truth and in fact, a portion of its temporal constituency. If this is an essential qualification at the time of their appointment, why should it not continue requisite during the whole period for which they were elected. The same reasons apply in the one case, as well as the other. No man can serve two masters any better in the church than in the world. The trustee must continue to have his feelings and interests identified with the society which he assumes to serve ; he must have no rival interests to promote ; and the time which he has to devote to such purposes, should be given to the society which first selected him. Besides, if one trustee can leave a church to become a member of another, or with the intent of abandoning religious worship altogether, and yet claim that no other can be appointed to exercise the functions of his office, all the trustees can do the same, and the church will be deprived of all means of continuing its opera-

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tions. The recusant trustees can refuse to act for the welfare of the body, and, at the same time, can retard its efforts and embarrass its action, even to the extent of bringing about its dissolution. For these reasons, it is clear to my mind that, if a trustee withdraws from a religious society, so that it can be said, he no longer belongs to it, he ceases to be a trustee ; and the society can elect a qualified person in his place.

The question, then, remaining for me to consider, is, Have the defendants ceased to belong to the Laight Street church ? I do not wish to be understood as saying that the letters of dismissal, which they asked for and obtained, are conclusive proof that they withdrew from the civil constituency of the church. This, *in itself*, was no more than a withdrawal from spiritual communion there,—a withdrawal from participation in its sacramental ordinances ; or, as I may be permitted to call it, its inner sanctuary. But, nevertheless, is it not a circumstance, which, taken with other circumstances, tends to show an actual secession from *the society*? In itself, it would not be sufficient ; but, when I find, in addition to this, at this very time, these trustees manifested a disposition incompatible with their duties to the church—that they endeavored to induce others to leave it, and prevailed upon more than one hundred members, in spiritual communion, to do so,—that they actually succeeded in organizing another society, though not yet incorporated, and have, ever since their receiving letters of dismissal, had separate worship on Sunday evenings, and other evenings, in a church in Franklin street ; that the pastor withdrew with them and ceased to officiate in Laight street ; and that they have attempted, in opposition to the will of an overwhelming majority of the society, to close the doors of their place of worship,—I cannot avoid the conclusion that they have seceded from the Laight Street church, and have, in effect, abdicated their office as trustees. At all events, enough has been shown to make it expedient, under all these circumstances, to grant an injunction until the hearing of the cause on the pleadings and proofs.

Motion granted ; \$10 costs to plaintiffs, to abide the event.

Grant agt. Power and Rapelje.

SUPREME COURT.

GILES P. GRANT agt. MELVIN POWER and JOHN RAPELJE.

A *sham answer* must be understood now as a *sham plea* was formerly, which was a *special plea, false and specious*—one which set up *new matter*. Therefore, an answer which merely denies the allegations of the complaint, but sets up no new matter, cannot be stricken out as sham or false. The Code confers on the court no new power in reference to striking out sham and false defences. Its terms are to be construed with reference to the legal language in use when it was adopted.

Monroe Special Term, June, 1856.

MOTION to strike out the answer of defendants as sham and false, on affidavits of its falsity. The action was upon two promissory notes. The complaint was not sworn to. The answer consisted of a simple denial of each and every allegation contained in the complaint.

LYSANDER FARRAR, *for plaintiff.*

J. P. FAUROT, *for defendants.*

By the court—E. DARWIN SMITH, Justice. When this motion was made at the last special term, I intimated that in my opinion the motion ought not to be granted; and stated that on the question presented I concurred fully in the views expressed by Judge MITCHELL upon a similar motion in *7 Howard*, 171; *S. C.*, in *14 Barbour*, 393. But, it being suggested that my brethren had held otherwise, separately, and at general term, I retained the papers to confer with them before deciding the motion. I find that Judge STRONG has granted motions like this, and has struck out a general denial as false and sham on several occasions, and that his decision in one case was affirmed at general term. Judge WELLES has decided otherwise at special term, since the decision at general term, and considers that case as governed by other, and its own particular circumstances.

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Judge STRONG, on the contrary, adheres to that decision, and follows it.

Judge WELLES now concurs with me in the opinion that the motion in this case ought not to be granted, and that to grant it is virtually to repeal subdivision 1 of section 149 of the Code, which expressly gives the right to put in such answer.

The power of this court to strike out false and sham pleas, was frequently exercised, and was unquestioned before the Code. The Code confers on the court no new power on the subject. Its terms are to be construed with reference to the legal language in use when it was enacted. *Sham* pleas, even at that time, were understood to be *special pleas*, *false* and *specious*. I concur in the views of Judge HARRIS, in *7 Howard*, 59, *White* agt. *Bennet*. A *sham* plea must be one which sets up *new matter*; not a plea merely denying some allegation of the complaint. (*Benedict* agt. *Tanner*, 10 *Howard*, 455; *Godell* agt. *Robinson*, 1 *Abbott*, 116; *Winne* agt. *Sickles*, 9 *Howard*, 217.)

The motion must be denied; but without costs.

SUPREME COURT.

STERLING SMITH agt. J. F. SCRIBNER.

Where a *married woman* contracts a debt, founded upon her *separate property*, with the approbation and consent of her husband, the creditor has a right, at his election, of suing both, or either one of them—both, if he wishes to reach the wife's property; and the husband alone, if it is desired to bind him personally.

New-York Special Term, April, 1856.

THIS is an action against a husband, for the alleged debt of his wife, arising out of a sale of goods which were delivered at a hardware store kept by the wife in Elmira.

Smith agt. Scribner.

J. BRICE SMITH, *for plaintiff.*

S. G. HATHAWAY, *for defendant.*

ROOSEVELT, Justice. The wife, it appears, had a separate estate, both real and personal, of her own, amounting to \$50,000. In 1851, with the approbation of her husband, she bought out the stock of a firm in Elmira, and set up, and has ever since continued, the business of a hardware merchant in her own name, her husband, by her appointment, acting as her agent in making purchases as well as sales.

The goods in question were sold in 1854, after Mrs. S. had been carrying on business in the manner described for about three years. They were charged by the plaintiff, in his books, to "J. F. Scribner, agent;" although the purchase was in fact made by one Cole, a clerk in the store of Mrs. S., and as her agent, he taking the goods to the store, where they were received as part of the stock in trade to be disposed of in the usual course of business.

Does such a purchase bind the husband? Or is the remedy against—and exclusively against—the wife?

The general rule undoubtedly is, that where a wife, although in her own name, makes an executory contract, with the consent of her husband, the transaction binds him, and not his wife. Equity, however, makes an exception in the case of married women, who have separate property—treating them, to the extent of such property, as single women. (*Jaques agt. The Methodist Church, 17 Johns. Rep. 548.*) The statutes of 1848 and 1849 confirm, and in some degree extend, the exception, making all the property of married women, whether real or personal, and whether settled on them or not, their sole and separate estate, "as if they were single females."

One of the essential attributes of property, as recently held by the court of appeals in the so-called liquor cases, whether such property be the property of single males or single females, is the right of sale and exchange. And is not a purchase made by a wife, in respect of her separate estate, a mere contract in effect to exchange so much of that estate for the goods pur-

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chased? And if so, is it not a contract, which, under both the statute and the equity rule, she has the power to make? The contract may not bind her personally, but it must, it would seem, bind her personality. How else can she be said to possess and enjoy the right, not only of holding, but of disposing of her property "in the same manner and with the like effect as if she were unmarried." To buy the property of another, as already suggested, is one of the modes by which the purchaser, to the extent of the stipulated price, disposes of his own.

Although, however, the wife, as a necessary incident to the exercise of her right, may contract a qualified obligation, does it necessarily follow that the husband is in no case bound? Can a husband carry on business in the name of his wife, buying and selling "as her agent," and himself "having charge of the store," and participating directly or indirectly, as we are bound to presume, in all the gains, without incurring any liability? The old equity rule certainly did not go that length. And the new statute, as we all know, and as its title imports, was enacted not to diminish the liabilities of married *men*, but "for the more effectual protection of the property of married *women*," —its leading feature being to secure to married women "the sole and separate enjoyment of their *property*, and to their husbands the sole and separate enjoyment of their *debts*. In the session of 1853, the legislature, it is true, corrected in part this seeming anomaly; but the correction, in express terms, was confined to debts contracted before marriage."

Where a wife, then, during marriage, contracts a debt with the consent and approbation of her husband, and especially where, as in this case, she contracts it with the direct agency and participation of her husband, the creditor, as it seems to me, has the election of suing both, or one—both, if he wishes to reach the wife's property; one, the husband alone, if it is desired to bind him personally.

Judgment for plaintiff for \$110.86, with interest from 15th April, 1854, and costs of suit.

Buzzard agt. Knapp.

SUPREME COURT.

SALLY BUZZARD agt. JOHN KNAPP.

A complaint in an action for a breach of promise of marriage, alleging, in substance, in reference to a promise, that, in a conversation between the parties at a time and place specified, the plaintiff asserted, among other things, that the defendant had promised to marry her; and that, at the same time and place, the defendant said to the plaintiff, he acknowledged he had done wrong in promising her as he did, and hoped she would forgive him; but if he should marry her, as they had talked, and she go to his house, it would make both miserable for life: and further alleging, that the defendant said to the plaintiff, in reply to her entreaties, she must try to forget it, and acknowledged he had done wrong, and that he was sorry for it, without otherwise averring a promise, does not state facts sufficient to constitute a cause of action.

Monroe Special Term, Oct., 1855.

DEMURRER to the complaint.

SIMEON B. JEWETT, *for plaintiff.*
JEROME FULLER, *for defendant.*

T. R. STRONG, Justice. The complaint in this case, is a palpable violation of the provisions of the Code, prescribing what a complaint shall contain. It does not contain "a plain and concise statement of the facts constituting the cause of action, without unnecessary repetition;" but, on the contrary, sets forth matter of evidence, without any general fact essential to the action, unless it is done by argument and inference. The court, on motion, under § 160 of the Code, would have stricken out the largest portion of the complaint, and directed that the residue be corrected and put in legal form; but on demurrer for the reason that the complaint does not state facts sufficient to constitute a cause of action, the only inquiry is, whether facts enough to support the action are stated in any form—whether plainly and concisely without unnecessary repetition, or argumentatively and inferentially, and in connexion

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with irrelevant and redundant matter, cannot affect the decision. One of the principal facts which it was required to state in this case, is the promise of marriage by the defendant. In reference to this, it is alleged in the complaint, in substance, that in a conversation between the parties, at a time and place specified, the plaintiff asserted, among other things, that the defendant had promised to marry her; and that, at the same time and place, the defendant said to the plaintiff, he acknowledged he had done wrong in promising her as he did, and hoped she would forgive him; but if he should marry her, as they had talked, and she go to his house, it would make both miserable for life.

It is further alleged in the complaint, that the defendant said to the plaintiff, in reply to her entreaties, she must try to forget it, and acknowledged that he had done wrong, and that he was sorry for it. If the fact of a promise of marriage is here set forth, the complaint is good, but if not, the demurrer is well taken.

It will be observed, that the plaintiff does not, in terms, allege a promise, but only that she told the defendant he had promised to marry her. It must appear to have been admitted by the defendant that he made such a promise, in order to the statement of the fact of such promise. A mere declaration, that the plaintiff had, at a previous time, said there was a promise, is not an allegation of a promise. If it appears that the defendant, in the conversation, admitted, without qualification that the declaration of the plaintiff was true, or that he had promised to marry her, I am inclined to think that is a sufficient setting forth of the fact that the promise was made. The declaration and admission do not constitute a direct allegation of the fact, but they are evidence of such force that the court may properly, for the purpose of the pleading, regard the fact as impliedly alleged. Does the complaint show that the defendant made such an admission? It is not alleged that the remark of the defendant, that he had done wrong in promising the plaintiff as he did, and that he hoped she would forgive him, &c., was in answer, or subsequent to, the declaration of

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the plaintiff, or that it related to that declaration. The whole complaint may be true, and yet this remark have preceded what is stated to have been said by the plaintiff, or related to something said by the plaintiff which is not given. If the remark was not in answer, or subsequent to what was said by the plaintiff, and so connected with it, and is regarded by itself, it does not appear what the promise was which is referred to by the defendant, or what the talk about marriage was.

And in respect to the other remark of the defendant, in answer to her entreaties, that he had done wrong, and was sorry for it, the particular entreaties are not stated; nor is it stated in what respect he had done wrong. There is not, for these reasons, entire certainty that the defendant has admitted the promise alleged; although the evidence set forth strongly tends to show that he has, and would doubtless satisfy a jury. Entire certainty should be required by the court as to the point of the admission; but to warrant it in drawing the conclusion of a promise from the declaration of the plaintiff, and admission by the defendant, and thus sustaining the pleading, a lower degree of certainty may be sufficient. (*1 Chit. Pl.* 287; *Spencer agt. Southwick*, 9 *Johns.* 314; *Tallman agt. The Rochester City Bank*, 18 *Barb.* 123, 138.) Greater certainty is required in a complaint than in answer.

I must, therefore, hold, that construing the complaint with the utmost liberality, it does not set forth the fact of a promise of marriage by the defendant; and hence does not state facts sufficient to constitute a cause of action.

The defendant must have judgment on the demurrer, with leave to the plaintiff to amend, on payment of costs.

In the matter of Van Tine agt. Nims.

SUPREME COURT.

IN THE MATTER OF THE APPLICATION OF JOHN VAN TINE FOR
AN ATTACHMENT AGAINST THEODORE T. NIMS.

It is very doubtful whether the common council of the city of New-York have any power to authorize any committee to inquire into the conduct or action of any person not a member of either branch of the city government—especially where such conduct may amount to a crime.

Where a special committee of the common council, appointed "to investigate the action of the committee on streets, who had under consideration the widening and improving of Reade-street," made inquiries of a witness before them, in reference to his own acts, with individuals other than the committee,

Held, that the special committee had no power to make such inquiries; they were not proper and pertinent questions within the meaning of the statute.

The statute has enlarged the grade of offence of *bribery*, at common law, from misdemeanor to a *felony*.

The law is well settled, that a witness is *privileged* from answering any question which will have a tendency to expose him to any kind of punishment upon a *criminal* charge.

And the witness must himself be the judge, how far the answer may tend to criminate him. But the witness may be compelled to state the *grounds* upon which he refuses to answer.

Special Term, March, 1855.

ORDER to show cause, &c.

M. V. B. WILCOXSON, *for relator.*

J. B. PHILLIPS, *for respondent.*

WHITING, Justice. Mr. Nims, a witness on a proceeding before a special committee of the common council, appointed "to investigate the action of the committee on streets, who had under consideration the widening and improving of Reade-street," declined to answer to several questions propounded to him.

He is before me on an order to show cause why he should not be compelled to answer those questions.

In the matter of Van Tine agt. Nims.

It is alleged on his part that he is not bound to answer—

1st. Because the subject of inquiry is not within the scope of the authority conferred upon the special committee.

2d. That the witness is privileged from answering, on the ground that the answers might criminate him.

The only authority conferred upon the special committee is to inquire into the action of the street committee. The authority conferred upon the special committee is special and limited, and they cannot go beyond the duty imposed. It is very questionable whether the common council have any power to authorize any committee to inquire into the conduct or action of any person not a member of either branch of the city government, especially when such conduct may amount to a crime. In this case, however, Nims answered every question put to him as to the action of the street committee, or any of its members, in relation to the widening and improving of Reade-street.

All the questions, to which answers are now sought from the witness, relate to his own acts with individuals other than the committee. These inquiries the special committee have no power to make; they are not "proper questions" within the meaning of the statute. To be proper, they must be pertinent to the investigation and connected with the subject referred, and relate to matters within the power of the common council to inquire about.

The act "to amend the existing law relating to bribery" makes the offer to furnish, in whole or in part, any money, goods, right in action, or other property, or anything of value, or any pecuniary or other individual advantage, present or prospective, to any member of the common council, with an intent to influence his vote or action upon any question, matter, cause, or proceeding pending, or which may by law be brought before him in his official capacity, a felony.

It also declares that "every person who shall knowingly bear or convey any such gift, gratuity, or proposal, or shall in any manner negotiate between any other persons for any act in violation of the preceding section, shall, upon conviction, be

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punished in like manner, and to the same extent," as the principals.

If Nims was in any way connected as an actor in offering to any of the persons named in the act, a bribe, or in any way negotiating between any other persons to such end, he would be guilty of an offence under this act. Bribery at the common law was a misdemeanor; but this act has enlarged the grade of the offence, and made it a felony.

The law is too well settled to need the quotation of authorities to show that a witness is privileged from answering any question which will have a tendency to expose him to any kind of punishment upon a criminal charge. When the disclosure he may make may be used against him, however remote the fact, if it may prove even one link in the chain of evidence, which, when others are made known, convict, or have a tendency to convict of a crime, he is protected by the law from answering the question.

"It is certainly not only a possible case," says one of the most enlightened jurists of any age, "that a witness, by disclosing a single fact, may complete the testimony against himself, and, to every effectual purpose, accuse himself entirely, as he would by stating every circumstance which would be required for his conviction. That fact of itself would be unavailing, but all other facts without it would be insufficient; while that remains concealed in his own bosom he is safe; but draw it from thence, and he is exposed to prosecution."

It is urged that the witness did not put his refusal to answer upon the ground that the answers might tend to criminate him, and that if he had he is not the judge of that, but that the tribunal before which he is examined must decide that question. It is enough to say, that the witness was not asked to state the grounds on which he refused to answer. If the question had been put he would probably have answered it; if he refused, he might have been compelled to have stated the shield the law gives him as the reason for his refusal. The witness, however, must himself be the judge, how far the answer may tend to criminate him. The court or tribunal could not know, or be

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competent to decide, whether it would or would not—unless the answer, no matter which way, must, from the very nature of things, be wholly indifferent. All that the court could do would be to see that the answer might have that effect; if it might, the privilege cannot be taken from the witness. If the answer, under no possible circumstance, could have any such tendency, the witness must answer.

In the case before me, it is very clear that affirmative answers to the questions propounded might lead to the development of a chain of evidence that might lead to his conviction of an offence within the law of the act against bribery. The reasons of his refusal to answer are so palpable upon the face of the questions, that the special committee did not (probably for that reason) deem it necessary to ask them to be stated.

It was urged before me, also, that unless such witnesses can be compelled to give evidence, the offence of bribery under the act cannot be reached. That is an argument to be addressed to the law-making power. When the legislature in its wisdom shall relieve such witnesses from all criminal and penal responsibility upon giving the evidence, then, and not till then, can the courts take from the witness the safeguards with which the constitution of the state, and repeated judicial decisions, have erected around them.

On both grounds the objections are well taken, and the order to show cause must be discharged.

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SUPREME COURT.

GIDEON HURLBUT, Assignee, &c., agt. WILLIAM ROOT.

A complaint, in an action by an assignee of a mutual fire insurance company, on a premium note to the company, payable in such portions, and at such time or times, as the directors of the company may, agreeably to their charter and by-laws, require, alleging that the plaintiff, as assignee and trustee of the property and effects of the company, ascertained the losses and expenses, and settled and determined the sums to be paid by the members liable to contribute, as their respective proportions of such losses and expenses, without averring that the directors made, or caused to be made, an assessment on the note, is bad on demurrer.

A voluntary assignee cannot make a valid assessment on such a note.

Whether an action can be maintained on such a note, without a prior personal demand of payment of the assessment—*quere?*

Monroe Special Term, Oct., 1855.

DEMURRER to a complaint.

J. M. HATCH, for plaintiff.

W. T. BRIGGS, for defendant.

T. R. STRONG, Justice. The note in this case is, by its terms, payable "in such portions, and at such time or times, as the directors of said company may, agreeably to their charter and by-laws, require."

It is alleged in the complaint, that the by-laws provide that the "directors shall, after receiving notice of any loss or damage by fire sustained by any member, and ascertaining the same, or after the rendition of any judgment against said company for loss or damage by fire, settle and determine the sums to be paid by the several members thereof, liable to contribute toward the payment of such loss, as their respective proportions of the same."

A similar provision is contained in the general act for the incorporation of fire insurance companies, to which this company

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is subject, passed June 25, 1853. (*Laws 1853, Chap. 466, p. 909, § 13—and is recited in the complaint.*)

It is further alleged in the complaint, that the company received notice from divers persons of loss or damage by fire, sustained by them while members of the company, and insured therein, on property covered by policies issued by the company; and that incidental expenses of the company had accrued; and that afterwards the plaintiff, as assignee and trustee of the property and effects of the company, ascertained the same, and the amount thereof for which the company was liable, and settled and determined the sums to be paid by the members liable to contribute towards the payment of such losses, as their respective proportions of such losses and expenses, &c.; but it is not averred that anything was done by the directors in relation to that subject.

Among the causes of demurrer assigned are, that the complaint does not state facts sufficient to constitute a cause of action, and that it does not appear by the complaint that the directors made, or caused to be made, an assessment on the note in question. I think it was essential to the cause of action, that the losses should be ascertained by the directors, and that they should make an assessment for the payment of them. The defendant promised to pay only in such sums as the directors might require; and a requirement by them of payment of a specified sum is a condition precedent to the obligation of the defendant to make such payment.

The by-laws of the company, and the act of the legislature referred to, authorize and make it the duty of the directors to ascertain and determine the sum to be paid. The company could not transfer the power or duty in this respect to the plaintiff. This power and duty belong to, and form a part of the franchise of the company, and cannot be delegated without an act of the legislature. A legislative act was deemed necessary to authorize receivers of the effects of such companies to make assessments. (*Laws of 1852, Chap. 71, § 2, p. 67.*) And by chapter 224 of laws of 1854, when an insurance company shall have made an assignment in trust for creditors, and the trust for

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any cause shall have become vested in the court, it is declared that the person appointed by the court to execute the trust, in addition to other powers and authority, shall have the power and authority conferred upon receivers by the act of 1852 aforesaid; implying that he would not possess them without an act of the legislature.

Another cause of demurrer assigned is, that it does not appear that payment of the assessment upon the note of the defendant has been personally demanded of him. The complaint is silent in respect to a personal demand. I am inclined to think such a demand was necessary to a right of action. By § 13, of the act of 1853—(see also *Laws of 1854*, p. 773)—it is provided that “if any member shall, for the space of thirty days, &c., after personal demand for payment shall have been made, neglect or refuse to pay the sum assessed upon him as his proportion of any loss, as aforesaid, in such case the directors may sue for and recover the whole amount of his deposit note, or notes, with costs of suit.” This, by a liberal construction, which should be given to it, appears to impose the necessity of a personal demand of payment to warrant a suit. But it is not necessary in this case to decide the question.

Several other points are made in support of the demurrer, which it is not necessary to consider.

The defendant must have judgment on the demurrer, with leave to the plaintiff to amend, on payment of costs.

SUPREME COURT.

IN THE MATTER OF THE HABEAS CORPUS relative to the custody of JOSEPH MURPHY, an infant.

Where a child in infancy was given, *verbally*, to an uncle and aunt, who took its custody, care and tuition for nine successive years; *Held*, that the uncle and aunt, especially when in accordance with the child's interests and inclinations, were entitled to a *parent's rights*. The natural parents of the child, under such circumstances, had no legal claim to it.

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New-York Special Term, May, 1856.

ROOSEVELT, Justice. The child, whose custody is disputed in this case, is an interesting lad, nine years of age, whose life, thus far, has been spent with an aunt and uncle, as his adopted parents. Immediately on his birth—for he was only eleven weeks old—his father and, what is perhaps more important, his mother, “gave” him, as is admitted, freely, and for the best of reasons, and with the most commendable of motives, to those who ever since, with more, if possible, than a mother’s and a father’s solicitude, have watched over his infancy, and to whom the lad himself naturally now clings with more than filial affection. The question is, shall they, under these circumstances, and at this late period, after so many years of approving acquiescence, be now rudely torn asunder? No interest of the child demands the sacrifice. On the contrary, his education, his inclination, his prospects in life, all, as far as can now be seen or foreseen, will be best promoted by his remaining with his adopted parents. Of their own once numerous family, all are dead, except a helpless daughter. Their means are ample, and their disposition to apply them not disputed. They are not only willing, but anxious to rear and to provide for this child, in all respects as if he had sprung from their own loins. Nine years of probation, and approbation, have sufficiently established their sincerity and their ability.

Have the natural parents, in such a case, paramount legal claims? It seems to me they have not. “The court,” says Chancellor KENT, (2 Com. 185,) “will investigate the circumstances, and act according to sound discretion; and will not, always and of course, take a child, though under fourteen years of age, from the possession of a third person, and deliver it over to the father, against the will of the child. The court will consult the inclination of the infant, if it be of sufficiently mature age to judge for itself; and even control the right of the father to the possession and education of his child, when the nature of the case appears to warrant it.”

The late supreme court (8 Johns. Rep. 328) applied this rule

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to the case of two children of the name of M'Dowles, one of whom was eleven, and the other only eight years of age.

In the present case, besides the interest and inclination of the child, there is, in my view, something nearly approaching to a right on the part of the adopted parents. The child was "given" to them; it was given by those who, or one of whom, had by law the right to make the gift. The statute of guardianship (2 R. S. 150) declares that every father of a child, under twenty-one, may "dispose of its custody and tuition during its minority, or for any less time, to any person." Ordinarily, a deed or will is necessary for that purpose. But do not nine years of undisturbed possession on the one part, and of uninterrupted acquiescence on the other, constitute as good evidence of the understanding of the parties as any written instrument? In ordinary contracts relating to property, where the statute of frauds requires them to be in writing, it is still a principle of equity jurisprudence, that part performance creates an exception to the general rule. In this case there is not only part performance, but a most substantial part. Nine years—the earliest of the twenty-one—may be justly considered as more than half of a child's minority. Having (under the verbal gift) performed a parent's duties for nine years, the uncle and aunt, especially when in accordance with the child's interests and inclinations, are entitled to a parent's rights. Those who have borne the cares of the child's earlier infancy, should enjoy the comfort of his mature years.

Ordered, that the demurrer to the return made to the writ of habeas corpus be overruled, and that the custody of the child be adjudged to the defendants.

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SUPREME COURT.

MICHAEL GAFFNEY & PATRICK GAFFNEY agt. ISAAC BURTON.

If a defendant believes his representations which he makes as to his ability to pay, before or at the time he purchases goods of the plaintiff, are true when he makes them, he is not guilty of any fraud, however false they may be in fact.

The *justification of bail*, mentioned in § 204 of the Code, means *upon notice* mentioned in §§ 195 and 196, *after* they have been excepted to by the plaintiff pursuant to § 192.

But a defendant cannot, on motion, have an order of arrest *vacated* after his bail have become *perfect*. And the bail become perfect, after justification upon notice; or until bail is procured that the plaintiff accepts without their justifying; or after *ten days* from the time specified in the order of arrest for the return thereof, if no exception is made by the plaintiff.

When no bail is given, the defendant may move to vacate the order of arrest at any time before he pays the judgment.

Delaware General Term, July, 1856.

Present, SHANKLAND, GRAY, MASON & BALCOM, Justices.

ON the 31st day of July, 1855, the plaintiffs issued a summons in this action to the sheriff of Oneida county, to recover \$347.43, for goods sold and delivered by the plaintiffs to the defendant. On the same day the plaintiffs, upon the affidavit of one M'Nall, procured an order from one of the justices of this court, requiring said sheriff to arrest the defendant, and hold him to bail in this action in the sum of \$700.

The order of arrest was granted upon the assumption that the defendant had been guilty of a fraud in contracting the debt, for the recovery of which the action was brought, or on the ground that the defendant had removed or disposed of his property, or was about to do so, with intent to defraud his creditors.

The sheriff arrested the defendant by virtue of said order, and served the summons in the action upon him, on the 1st day of August, 1855, on which day Lorenzo M. Taylor and Wm.

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B. Taylor became bail for the defendant in the action for the amount required by the order of arrest ; and on the same day the bail annexed their affidavits to the undertaking, stating that they were residents and freeholders, and householders of the state ; and that they were severally worth, in property not exempt from execution, the sum of \$700, over and above all their debts and responsibilities, owing or incurred by them. They also then acknowledged the undertaking. The sheriff thereupon discharged the defendant from arrest. The bail were not excepted to, and never justified in any manner except as before mentioned.

On the 18th day of August aforesaid, the defendant's attorneys served a notice of retainer in the action upon the plaintiffs' attorneys. The time to answer in the action was extended from time to time, by stipulation, until the 3d day of December, 1855, when an answer to the complaint was served. And on the 7th day of December aforesaid, the defendant, upon his own affidavit, and on the summons, complaint, order of arrest, and the affidavit upon which it was granted, and the plaintiffs' bill of particulars of their demand, gave notice of a motion to set aside the order of arrest, and to exonerate his bail in the action. The motion was made at a special term of the court held in Oswego county in January, 1856. The motion was opposed, and the plaintiff used affidavits on opposing the motion, other than the one upon which the order of arrest was granted.

The court vacated the order of arrest, and discharged the defendant and his bail from all liability by reason of said order, and awarded \$10 costs of the motion to the defendant.

The plaintiffs appealed from the decision of the special term to the general term of this court.

WHITE & DANA, *for plaintiffs*
PHILO GRIDLEY, *for defendant.*

By the court—BALCOM, Justice. The affidavit upon which the order of arrest was granted fails to establish that the de-

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fendant was guilty of a fraud in contracting the debt, for the recovery of which the action was brought. It does not show that the defendant knew that the representations were false, which he made as to his ability to pay before or at the time he purchased the goods of the plaintiff. If he believed his representations were true at the time he made them, he was not guilty of any fraud, however false they may have been. The information and belief upon which the charge is made in the affidavit, that the defendant had removed or disposed of his property, or was about to do so, with intent to defraud his creditors, is very unsatisfactory, and the whole charge is fully disproved by the defendant's affidavit. Nor do the additional affidavits on the part of the plaintiffs make a much better case for an order of arrest. The affidavits would not justify the continuance of the order of arrest, if the notice of the motion to vacate it had been given before the bail had become perfect. (*Martin agt. Vanderlip*, 3 *How. Pr. Rep.* 265.)

The plaintiffs' counsel insists that the defendant, by giving bail upon his arrest, who made oath at the time they executed the undertaking, to their ability and qualifications as bail, waived his right to object to the legality of the order of arrest. Section 204 of the Code reads, "A defendant may, at any time *before the justification of bail*, apply, on motion, to vacate the order of arrest, or to reduce the amount of bail." The justification mentioned in this section does not mean the affidavits of the sufficiency and qualifications of the bail, which the sheriff usually requires for his own satisfaction, when he takes bail upon the arrest of a defendant, and which the sheriff required and took in this case when he accepted the undertaking. It means the justification of bail *upon notice*, mentioned in §§ 195 and 196 of the Code, *after* they have been excepted to by the plaintiff pursuant to § 192 of the Code, and upon which justification the plaintiff may attend, and interrogate the bail as to their qualifications to be bail in the action. (*Cady agt. Edmonds*, 12 *How. Pr. R.* 197; 8 *id.* 213; *id.* 353; 1 *Duer*, 645; 3 *Sanf.* 706.) Thus far the decisions agree; but I am of the opinion those should not be followed that hold a defendant may move to va-

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cate the order upon which he has been arrested after his bail has become perfect.

The order of arrest specifies a time for the return thereof by the sheriff. (*Code*, § 183.) And by § 192 of the Code the sheriff is required, within the time limited by the order, to deliver the same to the plaintiff or attorney by whom it is subscribed, with his return endorsed and a certified copy of the undertaking of the bail. The plaintiff, within ten days thereafter, may serve upon the sheriff a notice that he does not accept the bail, or he shall be deemed to have accepted it, and the sheriff shall be exonerated from all liability. The sheriff, or defendant, upon the receipt of the exception to the bail, may give the plaintiff notice, and have the bail justify. (*Code*, §§ 193, 194, 195, and 196.) If the bail justify pursuant to such notice, the defendant cannot thereafter make a motion to vacate the order by which he was arrested. (*Code*, § 204.)

Prior to the Code, the defendant could not object to the sufficiency of the affidavit upon which the order to hold him to bail was granted, *after* his bail had been perfected. (*Gra. Pr.* 2d. ed. 164.) By the Code bail is perfected and accepted by the plaintiff, and the sheriff is exonerated from all liability, if the plaintiff *omits for ten days*, after the day named in the order for the return thereof, to give notice to the sheriff that he does not accept the bail. (*Code*, § 192.)

In *Lewis agt. Truesdell*, (3 *Sand.* 706,) the superior court of New-York city held, that an application to vacate an order of arrest, pursuant to § 204 of the Code, must be made *before the bail has become perfect*. That it must be made before the bail have justified, if excepted to; *and if no exception be taken, then before the time for excepting has expired*. This rule is reasonable, and it should be upheld. It imposes no hardship upon the defendant. He can as well make his motion to vacate the order of arrest before the time for excepting to the bail has expired, when the same are not excepted to, as he can before they justify, if they are excepted to. And besides, it is highly proper that there should be a time in the progress of an action,

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when the plaintiff will know that he will not afterwards be troubled with a motion to vacate the order for the defendant's arrest. (*See Stewart agt. Howard*, 15 *Barb.* 26.)

The case in 3 *Sandford*, before cited, is not in conflict with *Wilmerding agt. Moon*, (1 *Duer*, 645 ; 8 *How. Pr. R.* 213,) for the reason that the defendant in the latter case had not been bailed at all before he moved to vacate the order by which he was arrested. When no bail is given the defendant may move to vacate the order of arrest at any time before he pays the judgment in the action. If the plaintiff excepts to the bail, and thus puts the defendant to the trouble and expense of having his bail justify, or of procuring new bail, the Code extends the time in which the defendant may move to vacate the order upon which he is arrested, until his bail actually justify upon notice to the plaintiff, or until he procures bail that the plaintiff accepts without their justifying.

The defendants' counsel contends, inasmuch as there is no proof before the court that the sheriff has delivered the order of arrest to the plaintiffs, or their attorney, with his return endorsed, and a certified copy of the undertaking of the bail, (*Code*, § 192,) we should hold that the sheriff has not returned the order as required by the Code and the order itself. I think we should presume that the sheriff did his duty, and returned the order within the time therein specified for its return. But if no such presumption exists, the defendant gains nothing thereby, for the plaintiff must except to the bail within ten days after the return day *named in the order*; not within ten days after the order is actually returned by the sheriff to the plaintiff or his attorney, (*Code*, § 192,) or the bail becomes perfect.

I am satisfied the defendant did not move in time to vacate the order of arrest in this case. He was arrested and gave bail on the 1st day of August: the order was returnable the 6th day of August, and notice of the motion was not given until the 7th day of December following. Notice of the motion should have been given as early as the 16th of August, which was within the time the plaintiff had to except to the bail, and

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before the bail became perfect, by reason of the plaintiffs' omission to except to the same.

The order of the special term, vacating the order of arrest, should be reversed, with \$10 costs.

Decision accordingly.

SUPREME COURT.

AMOS DANN agt. WILLIAM BAKER.

Where a supplemental complaint is made, under § 177 of the Code, after answer, it is not allowable to a defendant, as a general rule, without special permission, to answer anew, or further, the original complaint.

Monroe General Term, Dec., 1855.

SELDEN, T. R. STRONG, and WELLES, *Justices*

APPEAL from an order denying a motion to strike out part of an answer.

A. DANN, *in person.*

J. Wood, Jr., *for defendant.*

By the court—T. R. STRONG, Justice. A supplemental complaint under § 177 of the Code, is not like an amended complaint under § 172, allowing any pleading to be once amended by the party of course, a substitute for the original complaint, by which the former complaint is superseded; but it is a further complaint, and assumes that the original complaint is to stand. Hence, where a supplemental complaint is made after answer, the answer is not, as in the case of an amendment after answer, at an end; but it remains in full force, and an answer is required only as to the supplemental matter. And I think it is not allowable to a defendant in such a case, as a general rule, without special permission, in addi-

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tion to answering the supplemental complaint, to answer anew, or further, the original complaint. There does not appear to be any good reason for permitting that practice, and no authority is cited, nor do I find any warranting it. If a further answer to the original complaint is necessary, leave to amend should be applied for, when the other party can be heard, and the court, if the motion is granted, can impose such terms as may be just. A supplemental bill, in chancery, generally called upon the defendant to answer the supplemental matter only; though in some cases, as of transmission or transfer of interest, and new parties, where a discovery was desired, the new bill might pray for an answer to both bills. (*2 Barb. Chan. Prac.* 72, 73.)

In the present case, the parties to the original and supplemental complaint are the same; their interests are unchanged; and the supplemental matter consists of allegations, that the defendant, after issue joined, claimed and received the benefit of that portion of the award on which the action is founded which was in his favor, and that he is therefore estopped, barred and precluded from questioning or resisting the plaintiff's demand upon that portion of the award which is against the defendant. No part of the original complaint is set forth; the new matter is stated to be in addition to the former complaint. The defendant has answered, by denying the matter of the new complaint, and setting up as a further answer, in addition to his former answer, a set-off in bar of the action. That portion of the answer presenting the defence of a set-off, the plaintiff seeks to have stricken out as unauthorized and irregular. There is no connection between such a defence and the matter of the supplemental complaint; and I am satisfied the plaintiff is entitled to the relief asked, unless he has lost it by delay.

The answer to the supplemental complaint was served the 5th of December, 1853, but it was immediately returned to the defendant's attorneys as unauthorized; and the question as to the obligation of the plaintiff to receive the answer was not settled until a decision of the court, on a special motion, between the parties the 29th of November, 1854. Notice of this

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motion was served the 21st of December thereafter for the special term, the 1st Monday in January. Upon these facts, I think, no laches are fairly imputable to the plaintiff.

It is insisted by the defendant's counsel that the 40th rule of this court, requiring motions to strike out of any pleading matter alleged to be irrelevant or redundant, to be noticed within twenty days from the service of the pleading, applies to this case; but I think otherwise. This is an attempt to connect with an answer to the supplemental complaint a further answer to the original complaint; the objectionable matter is, in form and substance, in answer to the original complaint; and the ground of the motion is not that the matter is irrelevant or redundant, but that a further answer to the original complaint could not be made without leave of the court.

My opinion is, that the order appealed from should be reversed, and the motion of the plaintiff granted.

SUPREME COURT.

BARENT TEN EYCK agt. THOMAS C. HOUGHTALING.

In an action for *rent due*, where there is a lease *under seal*, the plaintiff may elect to sue on the *covenant*, and thereby make the *covenant* his *cause of action*; or sue for the *debt*, (*rent*,) and by so doing make the *subsequent occupation* his *cause of action*.

And in the latter case, the lease *under seal* may be given in evidence to establish the relation of landlord and tenant, and to show the *amount* of the *debt*, even where the lease is not set out or referred to in the complaint.

The *Code* does not affect these questions, (which were the *same* at common law,) only so far as the *form* of bringing the actions are concerned—there not being any section that abolishes *causes of action*; nor, *it seems*, one that has been entirely able to *confound* them.

Interest is recoverable on rent due, in an action for use and occupation.

Albany General Term, March, 1856.

Present, HARRIS, WATSON and GOULD, Justices.

This was an action brought by the plaintiff against the de-

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fendant for *use and occupation* of certain real estate, situated in the town of Coeyman's, Albany county, N. Y. The defendant took a lease from the plaintiff, under seal, for the term of five years. The rent reserved, including the privilege of burning certain firewood, specified in the case, was \$50 per year. The premises were occupied for five years under this lease, and for two years after its expiration. Also for goods, wares, and merchandise sold. The summons and complaint were served on the 19th of March, 1855. The answer was duly served on the 7th of April, 1855. The reply was served on the 2d of May, 1855. The cause was, by an order, referred to Cyrus Stevens, Esq., of Albany, sole referee, and was brought to trial on the 14th of August, 1855. The referee, on the 25th of August, 1855, reported in favor of the plaintiff \$260.40.

The defendant excepted to the report on the following grounds:—

1st. That said referee improperly and illegally held that said plaintiff could recover, in an action for use and occupation, the reserved rents in a written lease, under seal, between the parties; and that said lease was good and conclusive evidence for plaintiff in an action to recover the rents for the use and occupation of the premises during the time specified in the lease, and the amount therein specified, without said lease being set out in the plaintiff's complaint, or without the fact that a written lease, under seal, existed between the parties, being stated therein.

2d. That said referee improperly and illegally found that said defendant was indebted to said plaintiff in the sum of \$30, for the hay-press referred to in the evidence.

3d. That the amount found by the referee, as being due from the defendant to the plaintiff, was against law, and the evidence in the case.

4th. That the referee improperly and illegally found and held, that said plaintiff was entitled to interest on the yearly rent as it became due according to said lease.

5th. That the referee improperly and illegally held that said defendant was, in law, bound to pay said plaintiff *fifty dollars*

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a year for the rent of the said premises during the two years, from April 1st, 1851, to April 1st 1853. The lease having expired on the 1st of April, 1851.

On the 10th of September, 1855, judgment was entered on the report of the referee in favor of the plaintiff for \$260.40, and interest from the date of said report. From said judgment the defendant appealed to this court.

LYMAN TREMAIN, for appellant, said,

1st. The action for use and occupation was not allowed at common law. It is only given by statute in cases where there is no sealed lease. (2 R. S. 3d ed. 82, § 26; 1 Cow. Tr. 3d ed. 174; 1 Wendell, 135; 7 id. 109; 1 Denio, 37; 13 John. 297; 3 Denio, 452; 2 Barb. 264.)

The Code does not affect the question. The fact constituting the cause of action is the *covenant to pay*, and not *the use and occupation*; and that *fact* is not set out in the complaint. In covenant, the demand is valid for twenty years, and the plaintiff would recover interest. In an action for use and occupation, the demand would be barred in six years, and the plaintiff could recover no interest, because the claim is for a "reasonable satisfaction," which is supposed to be unliquidated. If this pleading is allowed to prevail, all those substantial rules of pleading relating to covenant by lessor, or assignee of lessor, against lessee, or assignee of lessee, are of no avail, and the complaint no longer performs the office of giving notice of the facts constituting the cause of action.

2d. The referee erred in allowing interest upon the rents, in an action for use and occupation.

3d. The referee erred in allowing \$10 a year for seven years for the use of *fuel*, such claim not being covered by a claim for use and occupation of land. [The fifth exception covers this point.]

4th. The referee erred in allowing \$30 for bay-press. It was never delivered to, or taken by defendant. It was part of the realty. It was in possession of one Sherwood, who used

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the timber thereof, and the only evidence against the defendant was a loose declaration that he had bought it.

AMASA J. PARKER, *for respondent*, said,

1st. An action for use and occupation is founded upon a *contract*, express or implied, between the parties. (1 *Tenn. R.* 378; 2 *Saund. Pl.* 889—*marginal paging*.) It lies only when the relation of landlord and tenant exists. (15 *Barb.* 36—*HAND, J., and cases cited*; 7 *id.* 203—*ALLEN, J.*) Assumpsit for *use and occupation* of land by permission and assent of the plaintiff, on an *express promise* to pay a *certain sum*, lies at common law, independently of the statute of 2 Geo. II, ch. 19. (3 *Stark. Ev.* 1512, note (1). The plaintiff could recover in assumpsit for *use and occupation*, notwithstanding an agreement by deed, provided it contained no words of present demise. (3 *Stark. Ev.* 1512, note (3); 4 *Esp. c.* 59; *Peake's Ev.* 254.) In this case, the *contract is alleged truly and denied by the answer*. It is not stated, however, whether the contract was in *writing* or *under seal*, nor was that necessary.

Even under the old practice it was never necessary to allege a contract to be in writing. In *State of Indiana* agt. *Woram*, (6 *Hill*, 36,) *Bronson, J.*, says, “It has long been settled, that the declaration need not allege that the agreement was in writing, it is matter of evidence.” (*Van Sandvoord's Pleadings*, 2d ed., 266, 329.) An allegation that the *contract was in writing*, was not necessary, even on a promise otherwise within the statute of frauds. (15 *John.* 425; 6 *Hill*, 33; 15 *Barb.* 365; 17 *id.* 141.)

All the parts of the contract which were material were *alleged* and *denied*, and were proved. If any part of the contract material to the defence was omitted, the defendant should have set it up in his answer. But under a denial of what is truly alleged, he cannot exclude proof of the contract as alleged. The plaintiff sought to gain no advantage, and could gain none, by omitting to say, in his complaint, that the contract was in writing and under seal. It was done because there were seven

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years' occupation of the farm, *five* under the *writing*, and *two* more by *parol*; and it simplified the matter to complain for the whole together.

The plaintiff conceals nothing. He introduces the lease, thus showing the whole matter just as it was. Nothing is excluded which the defendant might desire to have received. It is true, under the old practice, a lease *under seal* could not support a declaration for *use and occupation*. But the reason was that the action being *assumpsit* could not be sustained by proof of a *covenant*, and this was the *only* reason.

Now, forms of action are abolished, (*Code*, § 69,) and previous *forms* of pleadings are abolished. (*Code*, § 140.) All that is required now, in all cases, is a plain and concise statement of facts. (*Code*, § 142. *sub. 2.*) Even under the old practice, if a *special agreement had been performed* (as in this case,) the balance due could be recovered on the *common counts*, *if the special contract had not been under seal*. (2 *Kern.* 370, and cases there cited.)

And the only reason why it could not be done, if the special contract was under seal, was because *covenant* would not support an action of *assumpsit*.

That reason no longer exists—all forms of action being abolished. There is now but *one form of action*. (*Code*, § 69.)

If the complaint was not sufficiently definite, the only remedy was by motion to ask the court to require the plaintiff to make it so, before answering. (*Code*, § 160.)

I deny that here was any *variance* between the complaint and the proof. But concede it, for a moment, to be so, would any judge have hesitated for a moment, *at the circuit*, to allow an amendment on the spot, there being no surprise, and both parties coming as they did, fully prepared to try the cause on its merits? The court would be clearly bound to do so. (*See Code*, §§ 169, 178.)

By § 178, it is made the duty of the court, even after judgment, to amend a pleading, "*by inserting other allegations material to the case.*" And no variance is to be deemed material unless "it have actually misled the adverse party to his preju-

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dice in maintaining his action or defence upon the merits." (Code, § 169.)

No one will pretend that the defendant is misled or prejudiced in this case. A variance not material is always to be disregarded. But here was no *variance*. The substance of the contract was alleged: that is, the use of the farm, and the agreement to pay for it. It was no longer necessary to state whether the contract was or was not *under seal*, because *that fact would no longer control the form of action*, and that fact was no part of the terms of the agreement. It could neither increase nor lessen to the extent of a single cent the sum defendant was liable to pay.

2d. Interest on the rent was properly allowed. BAONSON, J., says, "We have finally reached the conclusion, that a man who breaks his contract to pay a debt, whether the payment was to be made in money or anything else, shall indemnify the creditor, so far as that can be done, by adding interest to the amount of damage he has sustained by the breach." (Van Rens-selaer agt. Jewett, 2 Com. 135.) A computation will show that all defendant paid was credited and only interest allowed on the balance.

3d. The proof is abundant to support every item allowed by the referee. The only error he committed was against us, in allowing defendant's books as evidence. But we do not complain of that. We ask that judgment be affirmed.

By the court—GOULD, Justice. Had this case been decided on the argument; or on the points made, and authorities cited, to the court, I should certainly have held, that where there is a *sealed covenant* there is neither the necessity nor the power of implying any contract; inasmuch as to imply one different from the sealed one, would be to contradict the contract made by the parties; and to imply one the same as the sealed one would be needlessly absurd. And, of course, it would have been decided that the *sealed covenant* to pay rent is *itself the cause of action*; as, in covenant for rent, it was not necessary to allege (or prove) even an *entry* (by lessee) on the premises, or any occupation at

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all; "for, though he *neither enters nor occupies*, he must pay the rent; it being due *by the lease or contract, and not by the occupation.*" (1 *Saund. Rep.* 203, note 1.)

But it so happens that an action for *rent accrued*, (and that only where a party elected to bring *debt* for it, and *not covenant*,) was, at common law, a case, and the *only case*, in which, where there was a contract under seal, a plaintiff could declare generally, and produce his deed in support of such declaration. (1 *New Rep.* 109.) In this very case, however, it is decided that, where there was a contract by deed, it was "absurd to contend that the *action is not founded* on a deed, because if there had been no deed, the action might well have been maintained without it."

The *reason* for this distinction, however, is not to be found in the authorities I have cited. But in *Gould's Pleading*, pp. 810, 311, (Chap. 6, Part I, §§ 11, 13,) it is distinctly set forth, in showing why "*nil debet*" is a good plea to an action of *debt* for rent due on a deed of lease. The deed is said, then, to be pleaded only as *inducement* to the action; "the *subsequent occupation* of the defendant, under the demise, is the *gist* of the action; because rent is considered as a *profit, issuing out of land*; and when it is sued for, as a *debt*, the law considers the debt as arising out of the *receipt of the issues and profits* by the tenant, and not from the *deed*."

This opens a way for applying the provisions of the *Code* to the case at bar. For, were this case of rent due, *not* the *exception*, and the *only one*, to the rule, that *the covenant is the cause of action* so absolutely that you must *declare on it*; it would be in vain to attempt to apply § 69 as having *abolished forms of action*; or § 140 as having *abolished forms of pleading*: there *not* being any section that *abolishes causes of action*; or one that has been entirely able to *confound* them. But since, (for the reason above quoted,) a plaintiff may elect, in such a case, to sue *on the covenant*, and by so doing make *the covenant* his *cause of action*; or to sue for the *debt*, and by so doing make the "*subsequent occupation*" his *cause of action*—"the *gist of the action*")—and since, in this case, he *has* sued for

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the debt, thus *making the subsequent occupation his cause of action*, it must be decided that he has well pleaded a cause of action; and that being entitled so to plead *this* cause of action, the evidence was adapted to the pleading, and the proof of the sealed lease was of no effect, in the way of making a variance from the complaint, or for any purpose except to establish the relation of landlord and tenant, and to show the amount of the debt; and for these purposes it was proper.

As to the allowance of *interest*, I am not disposed to set aside the report for that reason. Where money has been really due, the party unjustly withholding it ought always to pay interest. And nothing but a positive and inflexible rule would compel me to decide to excuse him from it. So far from there being any such rule applicable to this case, the law is well settled in accordance with the referee's decision. (2 Com. 135.)

I have been unable to find, in the case, anything to warrant the allowance, for the last two years, of the ten dollars (in each year) for *fuel* used, as there is no proof that, for those years, the defendant used the fuel; and his agreement to pay for it did not apply to those years, unless he used it.

As to the hay-press, (were I to find a fact,) I should certainly prefer to have more evidence, and clearer, to satisfy me of its actual sale; especially as it is entirely clear that the defendant never actually took possession of any part of it; nor was it even on his premises. There is no justice in this allowance; it is not equitable; and I doubt its strict legality; (see 3 Hill, 141;) as plaintiff declared for it as "*sold and delivered.*"

I should order a new trial, unless the plaintiff reduce his judgment, by deducting the two items for fuel, of \$10 each, and interest, and the \$30 and interest allowed for hay-press.

SELLAR agt. SAGE.

SUPREME COURT.

SELLAR agt. SAGE.

If a complaint, in an action *ex contractu*, contain *allegations of fraud*, whether stated succinctly as issuable facts or otherwise, they will be stricken out as irrelevant and redundant.

New-York Special Term, June, 1856.

MOTION to strike out portions of the complaint as irrelevant and redundant.

T. DARLINGTON, *for motion.*

W. W. NILES, *opposed.*

CLERKE, Justice. The plaintiff had a right to sue the defendant in an action *ex contractu*, or *ex delicto*. He has elected the former, as I infer from an examination of the summons, (properly before me as a paper in the action,) taken in connection with the complaint. If he sued in an action *ex delicto*, he would have a right to state the issuable facts, showing the fraud, or other wrong; and, if he recovered judgment, he would have a right to issue execution against the person of the defendant, without any application to the court. But, as I deem the action commenced equivalent to the old action for money had and received, and therefore *ex contractu*, all statements relative to the fraud, even if the issuable facts relating to it were succinctly set forth, are manifestly irrelevant and redundant.

Motion granted, with liberty to the plaintiff to amend—\$10 costs to defendant to abide event.

SUPREME COURT.

IN THE MATTER OF THE GUARDIANSHIP OF HANNAH M. PIERCE,
an infant.

The *mother* of an infant child has no authority, by law, to dispose of the custody and tuition of such child during its minority; consequently, she has no power to appoint a testamentary guardian for such child.

A surrogate acquires *jurisdiction* to appoint a general guardian of an infant where the *actual residence* of the latter, for the time being, is in the county of the surrogate, although the *legal residence* or *domicil* of the infant is in another county.

Where such appointment of a general guardian is made by the surrogate, the question of *residence* can be reviewed only on *appeal*; although this court has the power to remove a guardian summarily, on application by petition, for good cause shown—such as the appointment of a person unfit for the office, &c., &c.

The legislature has made no provision for *costs* in *special proceedings* under the Code. (§ 3.) Therefore, in an original application to the court, which comes under the head of special proceedings, *motion costs* only can be allowed.

Monroe Special Term, May, 1856.

THIS was an application to remove a general guardian, appointed by the surrogate of Westchester county, of the infant, Hannah M. Pierce, aged twelve years.

The father of the infant resided, in his lifetime, in Westchester county, where he died in 1845, leaving a widow and this infant. Shortly after the decease of her husband, Mrs. Pierce removed to Monroe county with her child, where her parents resided, and continued to reside with her parents until 1850, when she died at her father's house, leaving the infant there, having made a will, by which she bequeathed all her estate, amounting to \$3,500 and upwards, to the said infant, and appointed one of her brothers executor and trustee of the estate, and another, guardian of Hannah M., all residents of Monroe. The will was duly admitted to probate by the surrogate of Monroe, and Hannah remained with her friends in this county till about two years ago, when, on the invitation of a sister of

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her father, the wife of the respondent, she went to Westchester to make a visit, and has since remained there.

In December last, the respondent presented a petition to the surrogate of Westchester in the usual form, stating that Hannah M. was a resident of that county, and procured himself to be appointed her general guardian.

The application to this court is now made by petition by the grandmother of Hannah M., for this court to appoint her son—named as guardian in the will of Mrs. Pierce, guardian of Hannah, and for the removal of the respondent.

FARRAR & DURAND, for petitioner.

E. WELLS, for respondent.

E. DARWIN SMITH, Justice. The mother of an infant child not being authorized by law to dispose of the custody and tuition of such child during its minority, (§ 1, *Title 1, Chap. 8, of Rev. Stat. p. 150,*) the appointment by Mrs. Pierce of her brother, Ambrose Cox, testamentary guardian is of course void; but as an expression of her wishes, at the time of her decease, in respect to her infant daughter, is entitled to respect, and ought to control the question of guardianship of the infant in all courts, unless good reason exists to the contrary, occurring since her decease. And a provision of law which allows, as in this case, of the appointment of a general guardian, of an infant, without notice to the relations, who would be interested in feeling, if not otherwise, to prevent the evidence of such maternal wishes, and such other considerations as might arise from respect to the source of the property of the infant, and a regard for her education, and the influences by which, in her immature years, she should be surrounded, is most obviously too unguarded, and greatly liable to abuse.

In this case a petition, in due form, was presented to the surrogate of Westchester county, stating that the infant was a resident of that county, and asking for the appointment of this respondent as her general guardian. Jurisdiction was thus acquired by the surrogate who has a concurrent power with this

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court in the appointment of guardians of the estates and persons of infants ; and his appointment is consequently valid, subject, however, to an appeal to this court. The residence of the infant was primarily that of her father, who lived and died in Westchester county, but it was doubtless changed by the removal of her mother with the infant child, and taking up her residence and remaining in Monroe till her death.

The statement in the petition that the residence of the infant was in Westchester county, was, therefore, a mistake in point of law, so far as relates to legal residence or *domicil*, but so far as actual residence for the time being is concerned, was true in fact ; and this was probably all the residence requisite to give the surrogate jurisdiction under the statute.

The respondent, therefore, I must consider duly appointed guardian ; and if the petitioner, or the maternal friends of the infant desire to review that question, they must appeal from the surrogate's decision in making the appointment, or apply to him to revoke it, and then appeal if he refuse to do so.

The respondent, by such appointment, becomes an officer of this court ; and I have no doubt of the power of this court to remove him summarily, upon petition for proper cause ; and I should have no hesitation to do so, if satisfied that he was an unfit person for such guardian, and his appointment was procured by false suggestions and fraudulent suppression of facts, without putting the petitioner to an appeal. (*See Disbrow agt. Henshaw*, 8 Cow. 349.) But, upon the whole merits, I think the respondent's appointment proper, and such as this court would have been likely to have made, if the facts are truly presented in the papers before me. The whole merits of the application, in point of fact, is completely negatived. It appears that the infant is in proper hands, where her deceased father desired her to be brought up, and where the mother, for much of the time before her death, preferred to have her remain, and where her brother and the trustee of her will has deemed it best for the child to be. And it also appears that said trustee advised the respondent to apply to be appointed guardian, and that such application was made at his instance.

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Under these circumstances, I do not think the appointment improper, and therefore must deny the application to remove the respondent, with costs.

This is an original application to this court, and comes within the description of a *special proceeding*, under § 3 of the Code. But the legislature has made no provision for costs in special proceedings as such, and I can therefore only give motion costs.

The application is denied, with \$10 costs.

SUPREME COURT.

AUGUST KALT agt. JULES LIGNOT.

Where the plaintiff's claim, and the defendant's counter-claim, each are over \$50, and on the trial judgment is rendered for the plaintiff, by setting off one claim against the other, for *less* than \$50, both are equally in the wrong, and each equally liable to the other for *costs*. It is a proper case, under the Code, for offsetting the costs of each against the other.

New-York Special Term, 1856.

SPEIR & NASH, *for plaintiff.*

CHAUNCEY SHAFFER, *for defendant.*

ROOSEVELT, Justice. This is a suit for professional services as a physician—the plaintiff claiming \$500 as the proper measure of compensation. The defendant first denies the services, then says they were not worth over \$25; then alleges unskillfulness, and damage consequent upon it to the amount of \$5,000; and, lastly, alleges that the plaintiff owes him, in addition, \$171, for champagne and claret. In other words, he meets the plaintiff's claim, be it more or less, by a counter-claim, for which, in his turn, he demands judgment against the plaintiff.

The referee, to whom the matter was submitted, rejected a

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large portion of the demands of each party, and found a small balance of \$32 in favor of the plaintiff; and the question now is, what disposition is to be made of the costs of suit.

By the Code, costs may be allowed "to the prevailing party, upon the judgment." In this case both parties have failed, and both have prevailed. But the plaintiff, it is said, has recovered less than fifty dollars, and must, on that ground in this court, pay costs. This is a mistake. Both parties, where a counter-claim is interposed, are plaintiffs and both defendants; and both, in this case, have "prevailed," and have "recovered" more than fifty dollars. It is only by setting off one recovery against the other that the balance is reduced to \$32. Both being equally in the wrong, and each equally liable to the other for costs, it seems to me to be a proper case for offsetting the costs of each against the other, and confining the judgment to the \$32.

Judgment accordingly.

The language of the Code, on the subject of costs, was adapted to the state of things existing in 1848. The right of counter-claim, as now existing, was the result of the amendment of 1852. The original Code, therefore, may be said to have contemplated but one "prevailing party"—the plaintiff or the defendant—whereas, the new provision obviously implied, as a consequence, that both might prevail—the one in his claim, the other in his counter-claim. Hence the law of costs, it was assumed, without special enactment, would be so applied as to meet the alteration in the law of claims. And it is the well known duty of courts of justice so to construe legislative enactments as to make them harmonize, as far as practicable, with each other, and with established principles of right.

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SUPREME COURT.

JOHN S. WHEELER and another, Administrators with the Will annexed of PHILANDER WHEELER, agt. ORVILLE DAKIN.

Where a plaintiff dies after judgment, there is no party left who can make a motion for leave to issue *execution* on the judgment; and the only remedy is an *action* by his legal representatives, to obtain the relief formerly reached by the writ of *scire facias quare executionem non.*

Such a proceeding is not an *action on the judgment*; it may therefore be brought without leave of the court. "An *action on a judgment*" (*Code*, § 71) is an action to recover of the defendant the amount due on the judgment, as any other money demand would be recovered, using the judgment only as evidence of the amount of the debt—such as actions of *debt* on judgment under our former system.

Section 161 of the *Code* was expressly intended to alter the former rule, (and it is abrogated in terms,) that in pleading a judgment or determination of a court of inferior and limited jurisdiction, the facts conferring the jurisdiction must be specially pleaded.

Now, in pleading any *determination* of a court of limited jurisdiction, it is not necessary to state the facts conferring jurisdiction, but such judgment or determination may simply be alleged to have been duly given or made. If that be denied, jurisdiction, and all jurisdictional facts, must be proved.

Dutchess Special Term, 1856.

THE pleadings in this action are as follows:—

"The plaintiffs complain of the defendant, and allege, that heretofore, to wit, on the 3d day of December, 1855, the above named Philander Wheeler recovered a judgment in the supreme court of the state of New-York against the said defendant, in an action upon contract, for the sum of eleven hundred and thirty-four dollars and eighteen cents, damages and costs, which said judgment was duly docketed in the office of the clerk of the county of Dutchess, in said state, on the 3d day of December, 1855, in which action said Philander was plaintiff, and said Orville was defendant, which judgment still remains undischarged and unpaid, and not reversed or set aside, and is now in full force and effect, and upon which judgment execution hath not been issued; that after the rendition of said

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judgment, and on or about the 15th day of December, in the year 1855, the said Philander died, leaving a last will and testament, and codicil; that said Philander was, up to the period of his death, a resident of the town of Salisbury, in the state of Connecticut; that after the death of the said Philander Wheeler, said last will and testament, with codicil, was duly proven in the court of probate for the district of Salisbury, in said state of Connecticut, a court duly organized, having authority to take proof of wills and admit the same to probate, and appoint such administrators as next described, under and by virtue of the laws of the state of Connecticut; and said plaintiffs were, by said probate court, duly appointed administrators, with the will annexed, of the goods, chattels and credits which were in said state of Connecticut, of the said Philander, deceased; that thereupon said plaintiffs accepted said appointment, were duly qualified and entered upon the discharge of the duties of such administrators; that afterwards, and on the 29th day of February last, said plaintiffs were duly appointed by the surrogate of the county of Dutchess, in the state of New-York, administrators, with the will and codicil annexed, of all the goods, chattels and credits, which were of the said deceased in said state of New-York, and thereupon were duly qualified, and entered upon the discharge of the duties of said office; that said defendant resided in said county of Dutchess at the period of the death of the said Philander, and immediately previous thereto he had assets which then were, or before the appointment of said plaintiffs as such administrators by said surrogate of the county of Dutchess, came within said county of Dutchess.

"Wherefore plaintiffs ask the judgment of this court in their favor, that execution may issue upon said judgment against said defendant in the name of the plaintiffs, to be levied of any lands which the defendant held when the said judgment was docketed, or for such further or other order, judgment or relief as may be meet and proper, with costs of suit."

The complaint was duly verified.

"The defendant demurs to the plaintiffs' complaint in this

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action, and sets forth and specifies the following causes of demurrer, and the grounds of objection to the said complaint:—

“ 1. That the plaintiffs have not legal capacity to sue.
“ 2. That the complaint does not state facts sufficient to constitute a cause of action.

“ 3. That the facts showing jurisdiction in the surrogate of Dutchess to appoint administrators of the estate of Philander Wheeler, deceased, are not alleged.

“ 4. That it is not alleged that said Philander Wheeler died in the county of Dutchess, or out of the state of New-York; or that he died out of the state of New-York leaving assets in the county of Dutchess, and in no other county.

“ 5. That it is not alleged that the deceased left assets in the county of Dutchess at or immediately previous to his death.

“ 6. That it is not alleged that the said action is brought by leave of the court, or for good cause shown on notice to the adverse party.

“ 7. That assuming all the facts stated in the complaint to be true, the plaintiffs are not entitled to the relief sought by their complaint.

“ Wherefore the defendant asks judgment in his favor upon said demurrer, and that the plaintiffs' complaint be dismissed with costs.”

D. S. COWLES, *for plaintiffs.*

HENRY HOGEBOOM, *for defendant.*

EMOTT, Justice. In *Jay* agt. *Martine*, (2 *Duer*, 654,) it was held by BOSWORTH, J., in the superior court, that an execution could not be ordered on a judgment on the application, by motion, of the representatives of a deceased plaintiff; and that §§ 283 and 284 of the Code are only applicable to judgments where all the parties to which are living. This decision was followed and approved by MITCHELL, J., at special term, in a case reported in 1 *Abbott*, 126. And in *Cameron* agt. *Young*, (6 *How. Pr. R.* 372,) it was held that the method of proceeding by writ of *scire facias* was abolished, and an action in the

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form given by the Code substituted. These cases, and the reasoning of the judges who delivered the opinions, are, I think, a correct exposition of the present state of law and practice on this point; and they dispose of the principal objection to this action raised by the demurrer, and urged on the argument. Such an action as this is not only a proper, but it is the only proper method of obtaining the relief which the plaintiffs ask. The case of the *Catskill Bank* agt. *Sanford*, (4 *Pr. R.* 100,) is in no degree in conflict with these views, or with the cases cited. That case decides in conformity with *Cameron* agt. *Young*, (6 *Pr. R.* 372,) that the proceedings by writ of *scire facias* are abolished as well as rendered unnecessary in such a case as the one then before the court, and other remedies given by the Code. In that case no change of parties, by death or otherwise, had occurred, and therefore the court were able to direct the issuing of execution upon an application by motion. The only possible doubt was, whether the repeal of the proceedings by *scire facias*, and the elections authorizing relief in such cases on motion, applied to judgments recovered before the Code took effect. The court held that they did so apply; but this decision is entirely consistent with the opinion, that where a plaintiff dies after judgment, there is no party left who can make the motion for leave to issue execution, and the only remedy is an action to obtain the relief formerly reached by the writ of *scire facias quare executionem non*. Nor is there any force in the suggestion, that this proceeding is an action on a judgment, and therefore cannot be brought without leave of the court. (*Code*, § 71.)

Without deciding whether this can be regarded as an action "between the same parties," or whether the administrators of a deceased plaintiff come within the principle of the decision in *Tufts* agt. *Bransted*, (1 *Abb.* 83,) where the general term of the superior court held, for reasons which I think are entirely convincing, that an assignee of a judgment is not within the prohibition of this section, I think the actions referred to by the words "an action on a judgment," in § 71, are actions to recover of the defendant the amount due on the judgment, as

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any other money demand would be recovered, using the judgment only as evidence of the amount of the debt—such actions as would have been actions of debt on judgment under our former system.

The action to revive and have execution in behalf of a deceased plaintiff, which is the substitute for a *scire facias*, is not within the mischief which this clause was intended to remedy, and therefore its provisions should not be extended to cut off such proceedings.

The evil at which this legislation was aimed, was the reduplication of costs and vexation of defendants, by bringing suits on judgments, instead of issuing executions, and following each new judgment by a new suit. Thus the defendant was subjected to an oppressive burden of costs, created in reiterated proceedings, which resulted in nothing but these increased costs, without increasing the remedies, or altering the position of the plaintiff in the original judgment. These suits were or might be continued *ad infinitum*, and with no other result. But the present suit will place in the hands of the plaintiffs a means of collecting their judgment, which, without the use of this or some equivalent method, they cannot obtain. And at the same time it is the only similar suit which can be brought on this judgment on the present state of facts, and cannot be the commencement of a series of vexatious actions. Besides, if the view I have taken of the scope and effect of the saving clause in the sections repealing the *scire facias* act be correct, such an action as the present is impliedly, if not expressly, given or retained by the Code.

Upon the remaining question presented by the demurrer I am equally clear against the defendant. Let it be conceded that the act of the surrogate in appointing administrators, with the will annexed, is analogous to a judgment or decree upon the merits of a matter in controversy in the surrogate's court; and that, by the former rules of pleading, all the facts showing jurisdiction in the surrogate to make the appointment must be pleaded, in order to show the right of the plaintiff to sue, as they must have been if a decree of the surrogate was the cause

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of action, and that these facts are not sufficiently averred in the present complaint. These points may all be conceded on the present argument; for in the view which I have taken of the case, it is unnecessary to decide them, although my inclination is against the defendant on all these points.

But, giving the defendant the advantage of all these considerations, the case is then brought directly within § 161 of the Code. The former rule was, that in pleading a judgment or determination of a court of inferior and limited jurisdiction, it was not enough to aver that the court had or had not acquired jurisdiction of the persons and the subject, but the facts conferring the jurisdiction must be specially pleaded—such as the service of process, the nature of the demand litigated, &c. (3 *Barb.* 603.) The 161st section of the Code was expressly intended to alter this rule, and it is abrogated in terms, and a mode of averring any judgment or proceeding of an inferior tribunal authorized, which, as I understand this complaint, the pleader here has adopted. In pleading any determination of a court of limited jurisdiction, it is no longer necessary to state the facts conferring jurisdiction, but such judgment or determination may simply be alleged to have been duly given or made. If that be denied, jurisdiction, and all jurisdictional facts must be proved.

In the present case, the right of the plaintiffs, or their legal capacity to sue, depends upon their appointment by the surrogate of Dutchess county. Their appointment in the state of Connecticut does not qualify them to sue in the courts of this state. And in pleading their appointment in this state, it is sufficient to aver, as has been done in this complaint, by what court or officer it was made, and that it was duly made. I think this satisfies all rules of pleading in such cases. (*See Beach agt. King, 17 Wend. 197.*)

There must be judgment for the plaintiffs, with leave to the defendant to answer in twenty days, on payment of costs.

The Sixpenny Savings Bank agt. Strong and others.

SUPREME COURT.

THE SIXPENNY SAVINGS BANK agt. SLOAN, and LEGGETT and
WIFE, and others.

To authorize the court to strike out a demurrer to a complaint as *frivolous*, its insufficiency as a pleading must be so apparent that the court can determine it upon bare inspection, without argument.

New-York Special Term, May, 1856.

MOTION to strike out a demurrer to complaint as *frivolous*.

J. OAKLEY, *for plaintiff.*

SHEPHERD & PARSONS, *for defendants.*

WHITING, Justice. The complaint is, to foreclose a mortgage. It alleges that Sloan and Leggett, on the 7th Dec., 1854, made and executed a bond and mortgage, covering real estate in this city, to E. F. Purdy, to secure the payment of \$40,000, payable in four several instalments of \$10,000 each. There is a clause in the bond, that on failure to pay the interest when due, the whole principal shall be collectable. That the three first instalments are due by lapse of time, and the remainder on account of the non-payment of interest. That Purdy, in December, 1854, sold, transferred and assigned *so much* of said bond and mortgage, and of the moneys secured thereby first to be received thereon, as should be sufficient to pay the plaintiffs \$25,094.65, with interest, and that the residue, as they are informed and believe, belongs to the people of this state. Sloan and Leggett being insolvent, made an assignment to Wright and Purdy for the benefit of creditors, who are in possession of the mortgaged premises. The people of this state are made defendants. Wright and Purdy demur to the complaint, and assign five causes.

1. A defect of parties.
2. That the people should have been made plaintiffs.
3. That the complaint does not state

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facts sufficient to constitute a cause of action. 4. That the complaint does not show that the plaintiffs are *owners* of the bond and mortgage. 5. That the bond and mortgage cannot be severed so as to give several and separate rights of action therein to different persons or parties.

Each of these causes may be well taken: they are, at least, worthy of serious examination. The rule is, that the court will not strike out a demurrer as frivolous, unless it clearly appears to be taken merely for the purpose of delay, or unless the grounds stated in it are clearly untenable. Its insufficiency, as a pleading, must be so apparent that the court can determine it upon bare inspection without argument.

It is very questionable whether the people should not have been made plaintiffs, or some reason given in the complaint why they were made defendants; and still more so, whether the moneys secured by a bond and mortgage can be assigned away in portions so as to give a separate and distinct right of action to different parties.

Motion denied, with costs to abide the event of the demurrer.

SUPREME COURT.

VAN ZANDT agt. COBB.

By § 388 of the Code, the court, or a judge, *may*, in their *discretion*, order either party to give to the other a copy of papers under his control containing evidence relating to the merits of the action or defence.

It would not be discreet ever to grant the motion where the production of the paper would help to deceive; and where there is a party in being who can be called upon to tell the whole truth, and then to produce the paper required. So held, where the defendant, who wished to prove a counter-claim, applied for the delivery, by the plaintiff, of an account rendered by the defendant to the plaintiff, and which account the plaintiff claimed was objectionable—and the objections had been stated to the defendant alone, which statement the plaintiff was unable to prove, if the account, as it stood, was delivered to the defendant as evidence of his counter-claim.

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New-York Special Term, July, 1855.

JAMES W. GERARD, *for plaintiff.*
SAMUEL SHERWOOD, *for defendant.*

MICHELL, Justice. The defendant, wishing to prove a counter-claim, moves that the plaintiff produce an account rendered by the defendant to the plaintiff. The affidavits show that a paper purporting to be an account was rendered by a clerk, but the clerk cannot prove its contents. The plaintiff, objects to the motion, alleging that the mere production of the paper will be a concealment of part of the truth, as injurious to him as a direct falsehood; that immediately after receiving it, he called on the defendant and objected to the correctness of the charges; that this was done only in the presence of the defendant; and that if this matter be kept back, as it would be by the mere production of the account, it would be argued, and perhaps conclusively, that the account being rendered to him, and he not showing that he had objected to it, was proof of the correctness of the account.

When a discovery was sought in chancery, the defendant could make the discovery, and accompany it with such explanations as he saw fit; and then the opposite party, if he would have made use of the discovery, must have put the whole answer in evidence. This was an exemplification of the enlarged principles of equity which prevailed in that court—if one would ask equity, he should do equity, and if he would put to trial the conscience of the opposite party to obtain a discovery of one fact, it should be only on condition that he should allow that party to state what favored himself relative to that matter, as well as what was against himself. A different rule would put the truthfulness of a party to too severe a test, and tempt him, when he could not speak the whole truth, so to discolor what he must disclose that it should not injure him more than the whole would if spoken. The defendant, in fact, suffers nothing, for he can obtain the testimony of the plaintiff at the trial, or before it; and if the

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plaintiff testify to new matter, not responsive to the defendant's inquiries, or not necessary to explain or qualify his answers, or to discharge him, when his answers would charge him, then the defendant may offer himself as a witness. (*Code*, § 395.) If the new matter be necessary to explain or qualify the previous answers, or to discharge when the previous answers would charge if standing alone, then the law and justice both allow the party a right so to qualify his previous testimony, without admitting thereby the opposite party to the stand.

By the *Code*, (§ 388,) the court or judge *may*, in their *discretion*, order either party to give to the other a copy of papers under his control, containing evidence relating to the merits of the action or defence. The order is not, in all cases, to be made when the paper is in possession of one party, and relates to the merits of the case to be made by the other party—but only when in such cases it shall seem *discreet* to the court. This discretion is not vested in the common-law courts in England by the act of 14, 15 *Victoria*; and the decisions under that act would not apply. It would not be discreet ever to grant the motion where the production of the paper would, as in this case, help to deceive, and there is a party in being who can be called upon to tell the whole truth, and then to produce the paper required.

The motion is denied, without costs.

Eldridge agt. Bell and Bell.

SUPREME COURT.

HIRAM D. ELDRIDGE, receiver, agt. SAMUEL BELL and WILLIAM L. BELL.

A *demurrer* which specifies that the complaint does not state facts sufficient to constitute a cause of action, cannot reach an objection that there is an improper joinder of parties.

If the misjoinder of parties were a ground of demurrer when the order of objections in respect to the parties to the action (stated in the Code) is passed, it is to be considered admitted for the purpose of the further prosecution of the suit.

The rule that the complaint must show a *joint* cause of action against all the defendants, is only applicable at law, and never did apply in equity.

Where a good cause of action in an equity suit is stated in the complaint, against one of several defendants, though not as against the others, a *joint demurrer* by all of the defendants is improper.

If the defendants who are unnecessarily made parties alone demur, the demurrer may be sustained; but the defendant against whom a good cause of action is alleged cannot for that reason demur.

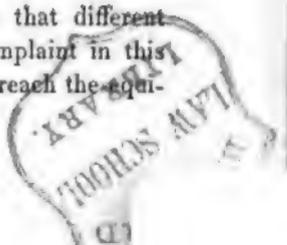
Cayuga Circuit, 1856.

DEMURRER to complaint.

This was an action in equity, by the receiver of the defendant Samuel Bell, appointed in proceedings supplemental to execution, to set aside various fraudulent conveyances, made by Bell to his son William L. Bell. The defendants both appeared, and put in a joint demurrer, specifying that different causes of action were joined in the complaint, and that the complaint did not state facts sufficient to constitute a cause of action.

GEORGE HUMPHREY, *for plaintiff.*
JAMES R. COX, *for defendants.*

E. DARWIN SMITH, Justice. The objection that different causes of action are improperly joined in the complaint in this suit, is untenable. The object of the suit is to reach the equi-



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table property of the judgment-debtor, in the hands of the other defendant William L. Bell, and the rules which apply to equitable suits are to govern this case, and not those which are exclusively applicable to legal actions, or causes of action of a purely legal character. The defendant Samuel Bell is unnecessarily made a party to the suit, and the only difficulty I had at the hearing was in respect to the question, whether the demurrer could be sustained on that ground. The Code allows demurrs to be taken in the following order, in respect to the causes of the demurrer:—

- 1st. That the court has no jurisdiction of the person of the defendant or subject matter of the action.
- 2d. That the plaintiff has not legal capacity to sue.
- 3d. That there is another action pending between the same parties for the same cause of action.
- 4th. That there is a defect of parties, plaintiff or defendant.
- 5th. That several causes of action have been improperly joined.
- 6th. That the complaint does not state facts sufficient to constitute a cause of action.

The demurrer in this case is for 5th and 6th causes, as above specified. The previous four specifications are passed, and therefore the demurrer can only be sustained upon one of these specifications. The specification designated as number five, above mentioned, is untenable as above stated. Can this objection of the improper joinder of parties be made under the last specification—that the complaint does not state facts and circumstances sufficient to constitute a cause of action? This is the only question that remains. I think it cannot; that if the misjoinder of parties were a ground of demurrer when the order of objections in respect to the parties to the action was passed, it is to be considered admitted for the purpose of further prosecution of the suit; that the parties are rightfully before the court, and that all objections on that score are waived. (*See 16 Barb. 65; Loomis agt. Tift, id. 541, also 12 Howard, 134; id. 183, &c.*)

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The objection that the complaint does not state a cause of action against both defendants jointly, proceeds upon the principles applicable to legal actions, or actions to enforce strictly legal rights. The rule that the complaint must show a joint cause of action against all the defendants, is only applicable at law, and never did apply in equity. If the proper parties were before the court, courts of equity always gave relief, although there might be an excess of parties, or parties in whose favor the bill was dismissed with costs.

The defendants have jointly demurred. There is a good cause of action stated in the complaint against William L. Bell, and it is no injury to him that his father is unnecessarily made a party. The complaint, at the hearing, may be dismissed as to Samuel Bell, with costs: but his being a party cannot defeat the plaintiff's right of action as against the other defendant, or affect his rights. A good cause of action against some of the parties to the record, will sustain a suit in equity, and formal defects will be amended by the court, or be overlooked when the objection is not distinctly made, and in due time. If Samuel Bell had alone demurred for the reason that he was unnecessarily made a party, his demurrer might have been sustained; but the other defendant has no ground of demurrer for that reason; and if he had, he must be deemed to have waived it by not presenting it formally and in its proper order. (*8 Howard, 392; 1 Abbott, 82; 4 Ed. Chy. 210.*)

Demurrer overruled, with leave to answer on payment of costs.

People *ex rel.* Darlington agt. Orser, sheriff, &c.

SUPREME COURT.

THE PEOPLE, on the petition of THOMAS DARLINGTON, agt.
JOHN ORSER, sheriff, &c.

Where a *court* of competent jurisdiction decides a jurisdictional question, (a commitment for contempt of court,) a justice of this court, at chambers, has no right to review such decision collaterally.

At Chambers, Dec. 20, 1855.

APPLICATION, by petition, for the discharge of John B. Overton from imprisonment.

H. Z. HAYNER, *for petitioner.*

S. F. CLARKSON, *contra.*

DEAN, Justice. The prisoner, John B. Overton, is imprisoned by virtue of a commitment by the court of common pleas of New-York, for an alleged contempt. The cause of the commitment is plainly charged, and set out in the commitment.

The proof taken before me shows that the question on which the want of jurisdiction in the court of common pleas is charged, was raised in that court, and decided at general term.

It will not do for an officer acting at chambers, collaterally, to review the decisions of courts of competent jurisdiction.

The prisoner must be remanded.

Birdsall agt. Tiemann and Fielder.

SUPREME COURT

FITZ WILLIAM BIRDSALL agt. ANTHONY TIEMANN and
FIELDER.

Covenants in a deed against *nuisances* and the *erection of steam engines*, on the premises, *create easements* for the benefit of other respective land owners. And it is unnecessary to insert them in subsequent conveyances to bind subsequent grantees.

Where such covenants have been inserted in a deed by an original owner, a subsequent grantee, or his lessee, whose conveyances contain no such covenants, may be perpetually restrained by *injunction* from erecting a steam-engine on the premises.

New-York Special Term, Feb., 1855.

MOTION for an injunction.

L. S. CHATFIELD, *for plaintiff.*

RICHARD MOTT, *for defendants.*

MITCHELL, Justice. Tiemann owns in fee, and leased to Fielder without any covenants against nuisances or the erection of steam-engines, a lot adjoining the plaintiff's house and lot. The deed to him did not contain any such covenants, being executed on a sale on foreclosure of a mortgage, nor did the mortgage contain them. But Mr. Ruggles, while he owned both lots, and many others in the neighborhood, conveyed them all with such covenants—and the successive grantees from him conveyed in like manner down to the one who conveyed to the mortgagor.

The effect of such covenants was considered and settled in *Barrow agt. Richard*, (8 Paige, 351,) and both Vice Chancellor McCoun and the Chancellor held that they created easements on the lands for the benefit of the other respective land owners. In that case there was no allegation that the covenants were contained in the deed to the defendant; and if an easement

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was created, it was unnecessary to insert them in subsequent conveyances.

Neither of the defendants has, therefore, a right to erect a steam-engine on their premises. Fielder, when written to on the subject, threatened that he would erect a steam-engine when he chose, and had already constructed a chimney fit only for that purpose. The plaintiff was justified, therefore, in seeking to restrain him by injunction: and a perpetual injunction must be granted against him, with costs.

Tiemann, the landlord, has done nothing to show a disposition to violate his covenant: he must, therefore, have his costs of defence. But as the chimney now erected is erected for the purpose of a steam-engine, and may remain after Fielder leaves, it is proper that the injunction restrain both defendants, and all claiming under them, or either of them, from erecting the steam-engine.

SUPREME COURT.

WILLIAM H. G. Post agt. NEW-YORK CENTRAL RAILROAD
COMPANY.

An *offer* made by a defendant under § 385 of the Code, (to take judgment,) should be so distinctly and openly made that there should be no doubt or mis-understanding about it.

This offer cannot be used as evidence, so the defendant cannot be subject to a recovery against him, unless it is accepted by the plaintiff.

But the offer is to be used as in the nature of a *pleading*, requiring a copy of it to be given to the court or referee, on the trial, with the summons and pleadings, to constantly admonish the plaintiff to stop the litigation; and that the court or referee, when there is a discretion in respect to costs, may act intelligently in regard to that question.

Monroe Special Term, March, 1856.

MOTION for costs by defendants, and extra allowance by plaintiffs.

Post agt. New-York Central Railroad Company.

Action for the specific execution of an agreement to construct a bridge for crossing over defendant's railroad, or for damages for its non-fulfilment. Tried before a referee, who denied the prayer for specific performance of the agreement, but made a report for the plaintiff, and ordered judgment in his favor for \$250, *with costs of suit*.

The plaintiff moves for extra costs, and the defendant moves for costs in the suit, on the ground that defendant had offered to let plaintiff take judgment for \$400, with costs, after suit brought, under § 385 of the Code.

The defendant's attorney swears to an offer served on one of the plaintiff's attorneys, (since deceased,) after suit brought. The other attorney of plaintiff, the plaintiff himself, and the counsel of defendant, deny that they, or either of them, ever saw or heard of any offer, and produce a letter of defendant's attorney, dated February 16, 1856, after the trial, conceding in effect that plaintiff is entitled to an extra allowance, and making no mention of any offer, or any claim for costs.

GEORGE BOWEN, *for plaintiff.*

E. A. HOPKINS, *for defendant.*

E. DARWIN SMITH, Justice. On the question whether an offer had, in fact, been made under § 385 of the Code, there ought not to be any room for conflicting affidavits, as in this case. The offer should be so distinctly and openly made, that there could be no doubt or uncertainty, or misunderstanding in respect to it. The object of this section of the Code was to check litigation, by giving the defendant an option to stop it at any time, and making its continuance, after a reasonable offer, at the peril of costs, on the part of the plaintiff. This offer cannot be used as evidence, so the defendant cannot be subject to a recovery against him, when an offer is made to purchase his peace, unless it is accepted by the plaintiff. But the offer is to be used as in the nature of a *pleading*—§ 259 requiring a copy of it to be given to the court or referee, on the trial with the summons and pleadings. This was obviously de-

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signed to make its existence notorious, to avoid mistake or misunderstanding about it, and constantly to admonish the plaintiff to stop the litigation; and for the further purpose that the court or referee, when there is a discretion in respect to costs, may act intelligently in regard to that question.

When this cause was tried, it is quite clear that neither of the parties or the referee understood that any offer had been made: none was spoken of by the parties, and no copy was furnished to the referee. The cause, most obviously, has not been proceeded in with the understanding on either side that it was proceeding at the peril of the plaintiff if he did not recover more than the \$400.

In view of this fact, and that the referee disposed of the case, and gave costs expressly, without having respect to any such question, I think it should be held, either that the defendants never made a *bona fide* offer, with intent to insist on it, or else that they have waived it. If the offer had been before the referee, it might have affected the verdict and course of the trial in some respects, or the question of costs which was within the discretion of the referee. (*Luddington agt. Taft, 10 Barb. 448.*)

The plaintiff's motion for extra costs should, therefore, be granted, and the defendant's motion for costs denied, without costs to either party on the motion.

Smith agt. Wright and others.

SUPREME COURT.

GEORGE SMITH agt. JOSEPH L. WRIGHT and others, commissioners of highways in the town of Kent.

It is the duty of commissioners of highways of a town, in all cases, where means are provided by law, to repair the roads and bridges within their jurisdiction.

And such commissioners, if they have the means, or have the *power of being supplied with the means*, and neglect to use and exercise the same, are liable as public officers, for any injury which may result from their neglect of duty.

Dutchess Special Term, June, 1856.

THE complaint in this cause charges, that in May, 1854, the defendants were commissioners of highways of the town of Kent, in the county of Putnam. That it was their duty, as such commissioners, to repair, or cause to be repaired, the bridges in said town; and the plaintiff avers, that from the sources mentioned therein, the defendants had, or might have had, ample and sufficient means to keep all the bridges in said town in repair.

That in consequence of the neglect of the defendants to repair one of the bridges in said town, the same was rendered unfit and unsafe for travel, and the horse of the plaintiff, in crossing it, was injured to the amount of \$150.

To this complaint the defendants demurred.

G. DEAN, for plaintiff.

C. GANUN, for defendants.

DAVIES, Justice. The defendants, by their demurrer, have admitted all the allegations of the complaint.

The material ones to be considered for the present are,

1. That it was the duty of the defendants to have repaired the bridge, at which the injury to the plaintiff occurred.
2. That the defendants had ample and sufficient funds for

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that purpose ; or if they had not, it was through their neglect or default.

In reference to the first point, there can be no doubt that it was clearly the *duty* of the defendants to repair the bridge in question.

This has been the recognised law of this state ever since the decision of the case of *Bartlett agt. Crozier*, (17 John. 439.) This was an action against the overseers of highways for injury caused by their omission to repair a bridge. Chancellor KENT, who delivered the opinion of the court, came to the conclusion that no action would lie against the overseers, because they act only under the orders of the commissioners, who alone are the responsible persons in respect to the repair of bridges. The statute gave them the care and superintendence of the highways and bridges, and *made it their duty* to cause them to be kept in repair. In that case he held that this duty did not exist absolutely, but only when the commissioners had money in hand arising from penalties and forfeitures, or which had been paid over to them under the direction of the supervisors, and inasmuch as the law had not supplied them with pecuniary means, nor armed them with the coercive power to meet and sustain so heavy a responsibility, an action would not lie against them.

In the case of *The People agt. The Commissioners of Highways of Hudson*, (7 Wend. 474,) the court quotes from the opinion of Chancellor KENT, in *Bartlett agt. Crozier*, as containing the true rule on the subject.

That was an application for a mandamus to compel the defendants to build a bridge which would cost over \$1,400. The application was denied for the reason that the only sum at the disposal of the commissioners in any one year was \$250, for the repairs of all the highways and bridges in the town. The statute, it was remarked by the court, did not extend their duty beyond their means.

This case clearly affirms the rule laid down in *Bartlett agt. Crozier*, that it was their duty to repair to the extent of their means.

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The same point was ruled in *The People agt. Adsit*, (2 *Hill*, 619,) which was an indictment against commissioners of highways for neglect of duty in not repairing a bridge. The indictment contained no averment that the defendants had funds, or other means to defray the expense, and the court were of the opinion that the existence of the funds or specific means, was a condition precedent to the obligation of commissioners of highways to repair bridges; and in the case of *Barber agt. Loomis*, (6 *Hill*, 463,) it was held that commissioners of highways were not bound to build or repair roads or bridges until the necessary funds were provided for that purpose.

I think, therefore, that it may well be regarded as settled by these causes, that in all cases the duty to repair is unquestioned when means are provided by law for that purpose. That the commissioners, if they have the means, or have the power of being supplied with the means, and neglect to use and exercise the same, are liable for any injury which may result from their neglect of duty.

But whatever doubt may have existed on this point, it seems to me that it has been removed by the causes to which I shall now refer. In *Adsit agt. Brady*, (4 *Hill*, 638,) the supreme court applied these principles:—

The defendant was superintendent of repairs on the Erie canal, and the action was brought against him for damages sustained by plaintiff in not keeping the canal in good repair, and removing obstructions to the navigation. The injury was caused by a sunken boat, which obstructed the navigation, and rendered it unsafe, and had caused the plaintiff's boat to sink. The defendant demurred to the declaration, but the court decided that the superintendent was bound by statute to keep the section of the canal committed to his charge in repair, and that under the provisions of that statute he had been, or *was in fault for not having* sufficient funds in his hands for that purpose, and it was therefore his duty to repair without unnecessary delay. The court says, "when an individual sustains an injury by the misfeasance, or nonfeasance of a public officer, who acts, or omits to act, contrary to his duty, the law gives redress to

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'the injured party by an action adapted to the nature of the case.' The principle, the court said, was well settled; and so well settled did it appear to them, that they did not adduce any authority to sustain it. There can be no doubt of this.

Applying these principles to the one now under consideration, what is the unavoidable conclusion? None other than that the defendants are liable to the injured party as public officers.

They admit, by the demurrer, either that they had ample and sufficient means for the repair of the bridge in question in their hands, or that they were in fault for not having the same. In either case they are liable.

I have not overlooked the distinction which the counsel for the defendants so ably and ingeniously undertook to draw between that case and the present, viz., that the plaintiff had a legal right to the use of the canal by paying toll therefor, and that therefore the defendant was liable, as in the case of a turnpike or railway. But the counsel must have seen that the case did not turn at all on that point. It was against a public officer for neglect of duty, and the court held him liable, because an injury had occurred which he had the means, or might have had the means of preventing. The liability on the ground supposed by the counsel would have been complete, whether the owners of the canal, turnpike or railroad, or their agents, had the means or not to keep the same in repair. If they had not the means, the law compels them to provide the same; and for any injury arising from their negligence in any manner, creates the liability.

All the points arising in this case have been fully discussed and passed upon in the case of *Hutson agt. The City of New-York*, in 5 Sand. Sup. Court Rep. 289.

The opinion of a majority of the court in that case have been affirmed by the court of appeals, and I must regard it as the law in this state. It will be observed that it was dissented from by one of the most learned and upright judges who has ever occupied a place in the judiciary of the state, the learned Justice SANDFORD, of whom it has been well said, that "we are

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at a loss whether most to admire—his deep and extensive learning as a lawyer, his diligence, probity and wisdom as a judge, his urbanity and refined sentiments as a man, or his piety and humility as a Christian."

Judgment must be rendered for the plaintiff upon the demurrer in this cause, with liberty, however, to the defendants, within twenty days after the service of notice of this judgment, to withdraw the same, and answer the complaint on payment of costs.

—————

SUPERIOR COURT, BUFFALO.

DAVID BURGART, appellant, agt. EDWARD STORK, respondent.

In cases arising in justices' courts in the city of Buffalo, an appeal lies from the county court to the superior court of that city only; and the decision of the latter court is final.

In cases arising in justices' courts out of the city of Buffalo, in the county of Erie, an appeal lies from the county court to the supreme court only, whose decision is final.

Where an assignor of a thing in action is examined on behalf of the plaintiff, (assignee,) the testimony of the defendant is not limited to the same identical point to which the assignor has been examined, but may be examined to the whole matter to which the point upon which the assignor was examined relates. (17 Barb. 538.) [This is adverse to several cases cited in note at the end of the case.]

Notice [ten days] of the examination of an assignor, under § 399 of the Code, is necessary only in the cases specified in the last part of that section—(not in all cases)—that is, as against an assignee or an executor, or administrator, or trustee, &c. (See the several cases referred to in the opinion upon both sides of this question.)

The provisions of the latter part of § 399 are rules of evidence, and are applicable to justices' courts.

General Term, May, 1856.

BURGART, as the assignee of one Conradt Scheiss, sued, in a justice's court, the defendant for the rent of certain premises. The plaintiff called Scheiss, his assignor, as a witness. The

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defendant objected to his being sworn, for the reason that no notice of his examination had been given. The objection was overruled, and Scheiss testified that he let to the defendant a tenement belonging to him at the rent of \$250 a year; that the defendant occupied it, and the balance of rent unpaid was \$55, which, after it became due, he had sold and assigned to the plaintiff. The defendant offered himself as a witness, and was sworn, and testified he hired the tenement of Scheiss at \$250 a year, and that Scheiss was to put it in good order. The plaintiff objected, that "this was new matter; that the defendant must confine himself to the facts proved by the witness, Scheiss."

The justice sustained the plaintiff's objection, and struck out that part of defendant's statement that the house was to be in good order. The defendant's counsel then asked him, "What did Scheiss agree to do on his part?" The plaintiff objected that this called for new matter, and the objection was sustained. The justice rendered judgment for the plaintiff for the amount testified to by Scheiss. The defendant, in his answer, set up that Scheiss had failed to perform his part of the agreement with defendant, to repair and finish the tenement. The defendant appealed to the county court, where the judgment was reversed, and from that judgment of reversal the plaintiff appeals to this court.

J. D. GROS, *for appellant.*

W. C. BRYANT, *for respondent.*

MASTEN, Justice. The justice clearly erred in not permitting the defendant to testify to all the terms of the agreement, or lease, between him and Scheiss, material to the issues. Scheiss, the assignor, testified to the matter of the agreement: this made the defendant a competent witness to the same matter on his own behalf. (*Code*, § 399.) The different parts of an agreement make up the whole agreement. The testimony of the defendant is not limited to the same identical point to which the assignor has been examined, but may be examined

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to the whole matter to which the point upon which the assignor was examined relates. (17 *Barb.* 588.)*

We might stop here, without examining the other point in the case. In cases arising in justices' courts in this city, an appeal lies from the county court to this court only, and our decision is final. In cases arising in such courts out of the city, the appeal from the county court is to the supreme court. The supreme court of this district holds, we are informed, that § 899 of the Code is applicable to justices' courts; and that notice, under the last clause of that section, of the examination of the assignor is necessary in all cases. This court has heretofore held differently. The county court, we are informed, follows the ruling of the supreme court. Under the circumstances we consented, upon the argument of this cause, to open the question. I will therefore proceed to the consideration of the other point in this case.

This point may be subdivided into two:—1. In what cases is a notice of the intended examination of an assignor necessary? 2d. Does § 899 of the Code apply to justices' courts;

1st. Section 898 declares, that no person offered as a witness shall be excluded by reason of his interest in the event of the action. Then follows § 399, which embraces three distinct matters, and which, for perspicuity's sake, might better have been in distinct sections. The first part declares to whom the last section is inapplicable:—"The last section (398) shall not apply to a party to the action, nor to any person for whose immediate benefit it is prosecuted or defended." The next part of the section is no way connected with the first. It does not grant the right to examine the assignor; its whole scope and effect is to give to the adverse party the right to confront the assignor, and testify as a witness to the same matter:—"When an assignor of a thing in action or contract is examined as a witness on behalf of any person deriving title through or from him, the adverse party may offer himself as a witness to the same matter on his own behalf, and shall be so received." The third or last part has no connection with either of the other parts of the section.

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In many cases the provision in the Code (§ 111) authorizing the action to be brought in the name of the party in interest, would render the assignor, by the common law rules of evidence, and without the aid of § 398, a competent witness. He was often an incompetent witness under the common law rule, not because of his interest, but because of his being a nominal party to the suit. His assignee was obliged to sue in his name. The third part of this section is a limitation of the common law rule, and renders the assignor who is not a party to the action, incompetent as a witness under certain circumstances—in a certain specified class of cases, whether he is interested or not in the event of the action. It is, "An assignor of a thing in action or contract shall not be admitted to be examined in behalf of any person deriving title through or from him, against an assignee, or an executor, or an administrator, unless the other party to such contract or thing in action, whom the plaintiff or defendant represents, is living, and his testimony can be procured for such examination; nor unless at least ten days' notice of such intended examination of the assignor, specifying the points upon which he is intended to be examined, shall be given in writing to the adverse party."

The policy seems to be, that if one party to a contract or thing in action testifies in reference to it, that the other party to it shall also be permitted to speak to the same matter. The case in which one of the parties to the contract is a party to the action is provided for by the second part of the section. The third or last part of the section, in order to carry out this policy, provides, in specified cases in which neither party to the contract is a party to the action, that the assignor shall not be examined in behalf of his assignee, if ten days' previous notice of, &c., shall not have been given, and if the testimony of the other party to the contract cannot be procured.

The assignor's competency as a witness, in the class of cases specified in this last part of the section, is made to depend upon two facts—ten days' previous notice of his intended examination and the ability to procure and confront him with the testimony of the other party to the contract. This third or last

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part of the section is a provision, or sentence by itself. The supreme court, at general term, in the 2d, 3d, 4th and 5th districts, the superior court in New-York, and the New-York common pleas, have given this construction to the section. (19 Bar. 442; 18 id. 592; 12 How. Pr. R. 163; 11 id. 248; 1 Duer, 809; 2 Abbott, 79.)

The supreme court at general term, in the 6th district, (10 How. Pr. R. 60,) and in the 7th district, (16 Bar. 580,) and in the 8th district, have held, that a notice was necessary in all cases. We adhere to our decision, that notice of the examination of the assignor is necessary only in the cases specified in the last part of the section.

2d. From the foregoing, I think it follows that the provisions of the latter part of § 399 are rules of evidence, and are applicable to justices' courts. (Code, § 64, sub. 15; and so are the cases 8 How. Pr. R. 341; 10 id. 60; 18 Bar. 582.)

My brethren agree with me upon all the points except that the 399th section is applicable to justices' courts, and upon that they express no opinion.

Judgment of county court affirmed, with costs.

Since writing the above, I have read the case of *Vassar agt. Livingston*, (3 Kern. 248.)

* Note.—This differs from the cases, 11 How. Pr. R. 403; 1 E. D. Smith R. 538; 12 How. Pr. R. 73; 10 id. 96.

SUPREME COURT.

MUNN and others agt. BARNUM.

In the *first judicial district* it is a rule to give a preference, on the circuit calendar, to the causes in which there is reason to believe that the defence is put in for *delay*.

Slight evidence of merits in a defence is sufficient to prevent the answer from being struck out, on motion, as sham or frivolous—it will be sent to the circuit.

A defendant cannot *demur* and *answer* to the same matter.

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New-York Special Term, Jan. 1855.

MOTION to strike out defendant's answer as sham and frivolous.

PLATT, GERARD & BUCKLEY, for plaintiffs.
BURRILL, DAVISON & BURRILL, for defendant.

MITCHELL, Justice. There is some reason to suspect that the answer was not put in in good faith, and that what is stated as on information and belief, was never communicated to the defendant. He says he believed it from an examination of the books of the company. That examination might lead to a suspicion that the plaintiffs did not own the stock, but is very slight evidence of the fact. It is enough, however, to prevent his answer, sworn to by him, and now substantially reaffirmed by affidavit, from being treated as sham. (See 2 Cow. 637; Muir agt. Cartledge, 8 Barb. 79; Caswell agt. Bushell, 14 id. 395.)

After the decision in the last case, this court adopted, in this district, a rule to give a preference on the circuit calendar to causes in which there was reason to believe that the defence was put in for delay. The plaintiff may probably obtain relief in that way.

The answer sets up a custom as to the mode of transferring stock. It very probably can have no influence on the case; but that may be better settled at the circuit than on special motion.

The answer concludes by demurring to part of the relief sought. The defendant cannot demur and answer to the same matter: he must, unless he elect to waive his answer, strike out this demurrer. The evil of allowing it to remain is, that the plaintiff might feel bound to have the demurrer passed on before he could go to trial.

No costs are given to either party.

Powers agt. Wolcott and others, &c.

SUPREME COURT.

DANIEL W. POWERS agt. ANSON WOLCOTT and others.

ANSON WOLCOTT agt. DANIEL W. POWERS and others.

In actions in *equity*, commenced not "for the recovery of money, or real or personal property," such as an action to restrain the acceptors from paying a draft, &c., no *extra allowance* can be given—none is provided for in such cases.

An application for an extra allowance (in a proper case) should not be made until *all the litigation is ended*. The embarrassments and duties of the courts on this question, considered.

Monroe Special Term, May, 1856.

MOTION for extra allowance.

The first of these actions was upon a bill of exchange drawn by Anson Wolcott upon G. W. Rogers & Co., three of the defendants, and afterwards endorsed by John Craig, another defendant, and discounted by defendant D. W. Powers.

The second suit was an action in equity, to restrain the acceptors from paying the draft, and Powers from transferring it, and asking that the same be cancelled and declared void, for usury.

The place of trial, in the first cause, was Monroe, and the same was noticed for trial for the October circuit, 1855—1st January, 1856, and referred, at the adjourned circuit in March, to a sole referee.

The place of trial of the second cause was Niagara county. An injunction was allowed in the cause. Motion to dismiss the same made and granted, and cause twice noticed for special term, and appealed to general term from order dissolving injunction. Place of trial changed to Monroe, but before trial was referred to sole referee, and tried with the first entitled cause at same time; the trial occupying part of two days, and report for plaintiff in the first, and defendant in the second suit, by the referee. The first entitled cause was put upon the

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calendar of short causes at the adjourned circuit in March, in Monroe, on motion of plaintiff's counsel, stating that it was a short cause, and could be tried within one hour.

JOHN H. MARTINDALE, *for Powers and Craig.*
E. J. CHASE, *for Wolcott.*

E. DARWIN SMITH, Justice. The application for extra allowance is upon the ground that the suits are difficult and extraordinary.

Such an allowance cannot be made in the suit in equity, for that was not commenced "for the recovery of money, or real or personal property;" and no provision for extra costs is made for such a case.

The first suit, separately considered, is an ordinary action on a bill of exchange for \$3,000. It was put at issue, and twice put on the calendar, and then referred to a sole referee and tried. The defence of usury is not of itself a difficult one. The law of usury is clear, well settled, and well understood.

The case was one of fact, and necessarily within a narrow compass: five witnesses only were sworn on the trial. Extra costs cannot be allowed, on the ground that the suit was a difficult one. The inquiry then is, was it an *extraordinary* one. This term must apply to the general character of the cause—the nature and extent of the litigation involved in it—the period of its continuance, the trouble of conducting it in respect to witnesses, counsel and parties, their situation and number, travelling and other expenses, the time consumed in the trial, and the extent of the litigation afterwards. All these considerations enter into the question, whether the suit was an extraordinary one. Here the plaintiff lived in Rochester, the cause was tried here, the witnesses all lived here, and the counsel for plaintiff resided here. The amount of the taxable costs, also, are to be considered. This cause was tried with another at the same time, and plaintiff's attorney gets two full bills of costs—two term fees, and two fees for trial before referee of \$15 and \$12.

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If this suit ends here, I can see no ground for an extra allowance; but if it should be litigated further, it might be a proper case for such allowance when the litigation is at an end. Unless the cause is to stop at this trial, it strikes me that these applications should not be made till all the litigation is ended.

These applications for an extra allowance are among the most embarrassing questions presented to the court. Knowing full well, as the judges do in many cases, that the labor, skill, and services of their professional brethren at the bar are quite inadequately compensated, these applications present a constant temptation to them to make up the deficiency by enlarging the boundaries of judicial discretion. But this should not be done. These statutes should be construed liberally, and executed fairly, like all other statutes, according to their intent; and the discretion they confer should be exercised carefully and discreetly, that no occasion may be given for their repeal on the ground that they are abused or misapplied. These considerations, duly appreciated by the bar, will relieve the courts of much embarrassment, and secure the best interests of the profession.

Motion denied.

COURT OF APPEALS.

HUNT agt. BLOOMER.

In order to review, on appeal, a judgment rendered upon a trial by the court without a jury, a case must always be made.

This case should contain the facts found by the judge and his conclusions of law stated separately, the exceptions taken during the trial, and also those taken after judgment, to his final conclusions of law.

If a party desire to review at a general term any finding on a question of fact, the case should contain the evidence bearing upon such question. Otherwise it should contain only so much of the evidence as is necessary to present the questions of law raised by the exceptions.

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The case should be proposed and amended, and settled by the judge who tried the cause.

Decisions made by the judge during the trial, and which are deemed erroneous, should be excepted to at the trial, and cannot be after judgment.

The exceptions which may and should be made within ten days after notice of the judgment, are to the final conclusions of the judge.

The proposed case and exceptions, if served within ten days after notice of the judgment, will be a sufficient exception to the final decisions of the judge.

But where the case and exceptions are not served within that period, exceptions to the final decision must be served within the ten days, to authorize such exceptions to be inserted in the case.

Exceptions which appear in the case as settled, will, on appeal, be assumed to have been duly taken.

Where the case does not contain exceptions taken during the trial or after the judgment, the case cannot be reviewed in this court, and the appeal will be dismissed.

March Term, 1856.

MOTION to dismiss the appeal.

The suit was instituted to foreclose a mortgage. At the special term the plaintiff moved the cause upon the complaint, the bond and mortgage therein set forth, and the answer of the defendant. He waived proof of the matters set up in the answer, claiming that they constituted no defence. The judge so ruled, and pronounced judgment accordingly. The record does not show that any exception was taken to the decision. On appeal to the general term the judgment was affirmed, and the defendant appealed to this court.

N. HILL, Jr., for motion.

JOHN MOODY, opposed.

COMSTOCK, Judge. The motion must be granted. The Code provides (§ 268) that, for the purpose of a review after a trial by the court, either party may except to a decision upon a matter of law arising on such trial, within ten days after notice in writing of the judgment, and that a case or exceptions may be made within the same time, or such further time as may be allowed by the rules of the court. The last part of the same section declares, that the questions, whether of fact or law, can be reviewed only in the manner prescribed.

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Under the former practice, exceptions could not be taken after the trial. If the court erred in charging, or in refusing to charge the jury, the exception was made and noted at the time, or at least before the verdict. But under the Code, where the trial is by the court, the judge takes the evidence, and his decision may be, and often is made afterwards. There is, consequently, no opportunity to except at the trial to the disposition which he finally makes of the questions before him on the whole case. To afford an opportunity of doing, after the final decision and judgment, what could not be done before, is the object of the first part of the section referred to. The exceptions which may be, and must be made within ten days after notice of the judgment, are those, and only those which, under the former system of practice, were made to the rulings of the court after the evidence was closed and before the jury retired. This clause of the section does not authorize exceptions to be taken, after judgment, to matters arising during the trial, and where there is an opportunity to except at the time the adverse decision is made. Where a party can except on a point ruled against him as the trial is proceeding, but omits to do so, and acquiesces in the decision, it might lead to great injustice to give him the benefit of an exception taken after the judgment. This was not the intention of the Code.

In order to review the judgment after trial by the court, a case must always be made. In settling this, the Code imperatively requires a statement of the facts found by the judge, and his conclusions of law. The party who prepares the case should insert this statement, which, like any other part of the case, will be subject to amendment by the other party, and settlement by the judge. If it be desired to review any conclusion of fact, the case will contain the evidence bearing upon that conclusion. It will also contain the exceptions taken during the trial, and those taken after the judgment to the final conclusions of law. The case, if served within the ten days, will be of itself a compliance with the first clause of the section, and no other exceptions will be required to satisfy that clause. If not served within ten days, then a formal exception

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must have been made and served within that time, as the authority for inserting it in the case afterwards prepared, and any exception, which appears in the case as settled, will be assumed to have been made in due time.

The proceeding thus prepared for the review of a judgment will combine the qualities both of a case and a bill of exceptions, as those terms were formerly understood. Its proper name, we think, is a case, but it must contain the exceptions taken during the trial, and those taken after the trial and judgment; and there is no right to a review upon a question of law on any other terms. The exception must be taken at the trial, if there was opportunity, or if not, then within ten days after notice of the judgment, and it must always be stated in the case.

In regard to the present appeal, there is in the record a brief entry, stating the fact of a trial on which the question was raised and argued, whether the answer showed any defence. It then goes on to state that the judge rendered the following judgment, setting it forth *in hac verba*:—This entry may be called a case, but it should have stated, in substance, that upon the facts set forth in the answer the judge ruled and decided, as matter of law, that there was no defence to the action, and that the defendant excepted. As there was no exception, so far at least as now appears, there is no right to have a review of the judgment.

The appeal should be dismissed.

All the judges concurred.

Appeal dismissed.

Johnson agt. Whitlock.

COURT OF APPEALS.

JOHNSON agt. WHITLOCK.

The review in this court of a judgment, entered upon the decision of referees, must be upon the case and exceptions upon which the cause was heard in the court below, except where, by leave of that court or the consent of parties, one presenting only the questions of law raised is substituted.

The court below has power, on motion, to reform the case on which the cause was reviewed in that court, so that it shall contain only the evidence and proceedings necessary to present the questions of law raised.

But that court is not authorized to change the case so as to present the facts otherwise than as found by the referees, or to insert therein exceptions not taken on the trial or to their final decision.

The manner in which the decisions of referees should be excepted to and reviewed, how a case for that purpose should be prepared, and settled, and what it should contain, discussed and pointed out by Comstock, J.

March Term, 1856.

MOTION to dismiss appeal.

The cause was tried before a referee, and judgment on his report in favor of the plaintiff was entered in September, 1853. The defendant appealed to the general term of the supreme court, and made a case which contained all the evidence, the exceptions taken during the trial, and exceptions to the referee's conclusions, both of fact and law, as stated in his report. On the case so made the judgment was reviewed at the general term, and, with some modification, was affirmed. After this affirmance, the defendant, intending to appeal to this court, prepared and served a statement of facts, in the nature of a special verdict, to be settled by one of the justices of the supreme court, with a view to have the same incorporated in the roll, and so returned on the proposed appeal to this court. The justice, before whom the motion to settle the statement was made, denied the application, on the ground that a practice of this kind was not allowed by the Code. The defendant then made and served, without motion or leave, a bill of exceptions, or case in the nature of a bill of exceptions, which contained the excep-

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tions taken on the trial and to the report of the referee, and so much of the evidence contained in the original case as was deemed material to the questions of law to be reviewed. The plaintiff, deeming this practice also irregular, proposed no amendments; and the defendant's attorney, regarding the case so served as settled by lapse of time, filed a copy of it with the clerk of the court in which the judgment was entered. He then brought his appeal to this court, and procured a return to be made containing the case thus prepared and filed, but omitting the original one on which the cause had been heard at general term.

N. HILL, Jr., *for appellant.*

JOHN H. REYNOLDS, *for respondent.*

COMSTOCK, Judge. The Code of Procedure provides that a trial before referees is to be conducted in the same manner as a trial by the court; that they must state separately the facts found and their conclusions of law; that their decision must be given, and may be reviewed in like manner, but not otherwise, and that they may in like manner settle a case or bill of exceptions. (*Code of 1852, § 272.*) The practice on reviewing the decision of referees must therefore be ascertained, if at all, by a reference to the provision concerning trial by the court, which is, in substance, (*see § 268.*) that the decision must be excepted to within ten days after notice of the judgment; that a case or exceptions may be made after the judgment, in settling which the judge must state the facts found and his conclusions of law. The law and the facts may both be reviewed at the general term, but the law only by this court; and the review can be had only in the manner specified.

We have held, at the present term, on motion to dismiss the appeal, in *Hunt agt. Bloomer*, (*ante p. 567.*) that after a trial by the court the only mode of review is upon a case which must contain the proper exceptions, if questions of law are to be examined on the appeal. The decision of referees can only be reviewed in the same manner.

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It has been more or less understood that an appeal may be taken on the record containing the report, and without any case being made, where it is intended to review conclusions of law only. But the Code does not admit of this interpretation. As a case must always be made after a trial by the court, and as the decision of a referee can only be reviewed in the same manner, it follows that the same proceeding must be taken.

We also said, in *Hunt agt. Bloomer*, that the case made after trial by the court must contain, not only the exceptions taken during the trial, but those taken afterwards, to the final decision of the cause. The same course must be pursued after trial by referees.

It seems to be a practice quite common to file and serve an exception, or a series of exceptions, to the report of the referee, and to print it as a paper entirely separate from the case. This is erroneous. The Code says, the decision of the referee may be excepted to within ten days after notice of the judgment, and the exception is no doubt properly made by filing and serving it. But this is not the proceeding on which a review is to be had. The exception is thus allowed to be made because there was no opportunity to make it at the trial. It must be made within the time as a condition to the right of inserting it in the case. If the case is prepared and served within the time, it may contain the exception, and there will be no occasion to file or serve it as a separate matter. The intention of the Code is to give a right simply to except afterwards, where it cannot be done at the trial; but the case and exceptions made after the final decisions are by no means separate proceedings on appeal. They must be incorporated together.

We have also said, that in settling the case at the trial by the court, the facts found and the conclusions of law must be separately stated. (*Hunt agt. Bloomer, supra.*) This the Code explicitly requires, and this must also be done when the trial is by referees. Their decision is to be reviewed in like manner, and not otherwise: and they may in like manner settle a case or exceptions. On this point it is believed there is quite a general misapprehension. The decision of the referee, which

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goes into the record as the basis of the judgment, usually contains a statement of facts and conclusions of law; and hence it has been supposed that no statement of this character need be made in the case. The Code, indeed, requires that referees shall state the facts found and the conclusions of law separately, but it does not say that such statement must be contained in the report of their decision. On a trial by the court, the decision of the judge need not contain any special statement of this kind. It merely sets forth what the judgment is to be, without giving the reasons. The facts found and the legal propositions based thereon, are to be stated only for the purpose of a review, and then they are to be contained in a case which the judge is to settle. The decision of referees "must be given" in like manner, and "in like manner" they may settle a case. My conclusion is, although a different practice has prevailed, that the decision of a referee may be in the same general form as that of a judge. No possible reason for a distinction can be suggested; and I do not think the Code intended to make any. The grounds of decision are of no importance in either case where there is no appeal. Those are of consequence where a review is to be had, and then a case must be made in whichever mode the cause has been tried. It is at all events clear, that the case must be settled by the referees in the same manner as by the judge; that is to say, it must state the facts found and the conclusions of law.

Under the exposition of these provisions of the Code, which has been given, there will be no occasion for the variety and confusion which have prevailed in practice. The procedure for a review will be simple and entirely homogenous in both the modes of trial, and this is what the Code evidently intended. For the sake of greater distinctness, it may be summed up thus: After trial, the first step will be to except, within the time limited, upon the legal points and propositions involved in the final decision ruled against the party intending to appeal. The next proceeding will be to prepare a case, and have it settled by the judge or referees, if not agreed on. This will contain the evidence bearing upon any conclusion of fact intended to

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be reviewed; also the exceptions taken during the trial and those made after the trial to the final decision. The facts found and conclusions of law must be separately stated. This statement, like the other parts of the case, must be prepared by the party who appeals, and of course it will be subject to amendment and settlement. On the case so prepared and settled the review is to be had at the general term. The exceptions, separately served after judgment, should not appear at all, except as they are settled and stated in the case.

The motion before us to dismiss the appeal presents the question, whether the same case on which the review was had at the general term should be returned to this court, or whether a new case may be made without consent or leave of the supreme court. As questions of law only can be reviewed in this court, it would certainly be desirable and commendable practice, if the parties can agree upon a form of a case which will relieve the record of useless and redundant matter. We can only examine errors of law upon exceptions duly stated in the case, and therefore a brief statement of the evidence or facts upon which the questions arise is all that is useful on a review in this court. But the Code has given to the appellant no right to make up and serve a new case after the affirmance of the judgment in that court. In the absence of any agreement between the parties, and of any different settlement by the supreme court, the review in this court is to be had upon the case as originally prepared and settled. The inconvenience which such a practice is calculated to produce will be less felt if the party intending to appeal to this court has been careful to have a full and precise statement of the facts found, and conclusions of law inserted in his original case. If this statement has been imperfectly made, we have no doubt of the power of the supreme court to direct a resettlement, and to reform the proceedings in any manner not inconsistent with the actual finding of the judge or referee upon the facts. The facts, as found, cannot be changed and found differently, nor can leave be had to insert exceptions, never in fact taken, but within these limitations it will always be proper to move in the supreme court.

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not to turn the case into a bill of exceptions, a proceeding which has no existence under the Code, nor into a special verdict, but so to amend the case itself as to fitly present the questions which are to be examined in this court. And there is always occasion sufficient to justify such a motion, when the case, as heard at the general term, contains a mass of evidence bearing only upon questions of fact, or wholly unnecessary to explain the exceptions and questions of law. But where there has been no action of the supreme court, and the parties have not agreed upon anything different, the appellant may, and he must, have returned, on his appeal, the same case on which the cause was finally determined in the court below.

We therefore dismiss the appeal, but without costs, for want of a proper return, unless one be made within thirty days after the close of the next general term of the supreme court in the eighth district.

Appeal dismissed.

[ERRATUM.]

COBINE agt. CYNTHIA ST. JOHN and PETER ST. JOHN, her husband.

In the report of this case in this volume, (*ante page 337,*) there is a mistake in the quotation of a section of the Revised Statutes. It should read, "The court of chancery shall dismiss every suit concerning property, where the matter in dispute, exclusive of costs, does not exceed one hundred dollars, *with costs to the defendant.*" (2 R. S. 173, § 37.) The words "*with costs to the defendant,*" are omitted, *ante page 337.*)

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